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AND ITS PROVINCES

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VOLUME VIII

THE DOMINION
POLITICAL EVOLUTION

PART III

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AND ITS PROVINCES

A HISTORY OF THE CANADIAN
PEOPLE AND THEIR INSTITUTIONS
BY ONE HUNDRED ASSOCIATES

GENERAL EDITORS: ADAM SHORTT
AND ARTHUR G. DOUGHTY

VOLUME VIII

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POLITICAL EVOLUTION

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THE FISHERY ARBITRATIONS

THE FISHERY ARBITRATIONS

I

THE NORTH ATLANTIC COAST FISHERY DISPUTES

ON January 29, 1909, the United States and Great Britain entered into a special treaty agreement for the submission to arbitration of all questions relating to the fisheries on the coasts of Canada and Newfoundland.

For over a century and a quarter the dispute had been carried on with more or less virulence, and on several occasions had brought the two nations to the verge of war. It was not a controversy that through lapse of time had acquired merely historic interest; it affected interests that were substantial and in some respects vital to portions of each nation. The views of both countries had been so long maintained and so strenuously urged that neither could with grace retreat from the position it had taken. The national honour of each was in a measure involved. Through the participation of many of the ablest and most honoured statesmen on both sides of the Atlantic, the controversy had acquired that sanctity which the sentiment of a nation gives to the assertion of its rights. From the point of view of international law, the questions involved were of special interest and of the utmost consequence, not only to the two powers directly concerned, but also to every nation of the world. Every consideration that moves a sovereign nation to regard and maintain the interests of its own people urged Great Britain and the United States to press their views of this controversy.

Status prior to the Treaty of 1818

Dispute between the colonies and the mother country on the fisheries question first arose in the years immediately preceding the revolt of the American colonies. The nations of Europe had been struggling for upwards of a century for the possession of the fisheries in the northern parts of North America. France, as the principal settler there, had long claimed the exclusive right to them. Great Britain, moved in no small degree by the value of these fisheries, had won Canada from France, and had limited by treaty, within a narrow compass, the right of France to any share in the fisheries. Spain, upon some claim of prior discovery, had for some time enjoyed a share of the fishery on the Banks, but at the last treaty of peace, in 1763, had expressly renounced it.

At the commencement of the American Revolution, therefore, these fisheries belonged exclusively to the British nation. The colonists of Massachusetts and other New England states, as British subjects, had continuously resorted to the fishing-grounds, which were an important source of living and revenue to them. Though the fisheries are relatively unimportant in modern times, they were of vital importance to New England in 1782. The reigning toast in Massachusetts was, 'May the United States ever maintain their rights to the fisheries!' The American colonists considered that these fisheries had been discovered, exploited and developed by them; that they had been won by their toil, by their blood, by their activity; and when peace began to be talked about in 1782 they contended that they had as good a right to maintain a claim to continue in the enjoyment of them as British subjects across the sea, and a better right than the new subjects in Canada. And so the American peace negotiators, Franklin, Adams and Jay, were instructed by Congress 'that in no case, by any treaty of peace, the common right of fishing be given up.'

The Treaty of 1783.—Resolutely maintaining that position, the United States plenipotentiaries at Paris were able

to exact as the price of peace from Great Britain, in the position of weakness in which she found herself in 1783, the terms of a treaty by which equal rights with British subjects to take fish of every kind in all British North American waters were given to every inhabitant of the United States. The right was unlimited as to any distance from shore. It was absolutely the same right as British subjects themselves had, except that American fishermen were not permitted to dry and cure their fish on the Island of Newfoundland.

The Treaty of Ghent, 1814.—No question with respect to the fisheries article of the treaty of 1783 or the use of the fisheries under it arose until the close of the War of 1812, when Great Britain took the position that the rights of American fishermen had been abrogated by that war, the United States insisting with equal vigour that those rights were perpetual. When the negotiators met at Ghent in 1814 to sign a treaty of peace, it was found impossible to reach any common ground, and the whole subject of the fisheries was left open by that treaty as an unsettled subject of difference between the two governments, and, possibly, as Henry Clay expressed it, 'as a nest egg for another war.'

Period from 1814-18.—Continual collision and friction were of course inevitable. Scarcely six months after the signing of the Treaty of Ghent, occasion arose for the renewal of the controversy as to whether the inshore fisheries of the treaty of 1783 had survived the War of 1812. On June 19, 1815, occurred what is known as the '*Jaseur* incident.' Captain Lock of H.M.S. *Jaseur* warned an American fishing vessel, engaged in cod-fishing about forty-five miles distant from Cape Sable, not to come within sixty miles of the coast. On the protest of John Quincy Adams, American minister at London, Lord Bathurst hastened to disavow the warning, and stated that the action complained of was totally unauthorized. Lord Bathurst assured the American government that Great Britain did not pretend to interfere with the fishing operations of American vessels on the Grand Banks of Newfoundland, in the Gulf of St. Lawrence, or at places in the sea without the jurisdiction of the maritime

league from the coasts under the dominion of Great Britain ; at the same time he informed Adams that Great Britain could not acknowledge the right of the fishermen of the United States to use the shores of British territory for purposes connected with the fishery, and that their vessels would be excluded from the bays, creeks, harbours and inlets of all British possessions.

During the years 1816, 1817 and 1818, a score or more American fishing vessels were seized in the Bay of Fundy by British cruisers, and the result of four years was to demonstrate that some arrangement must be made. Accordingly after prolonged negotiations, in October 1818, a new treaty was entered into, and it is upon the terms of this treaty that American fishing privileges now rest, and it was these terms that had to be interpreted by the Tribunal of Arbitration at The Hague.

Interpretation of the Treaty of 1818

Treaty of 1818.—The fishery article of the treaty of 1818 is as follows :

> Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry and cure fish on certain coasts, bays, harbours and creeks of His Britannic Majesty's dominions in America :
>
> It is agreed between the high contracting parties that the inhabitants of the said United States shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks from Mount Joly on the southern coast of Labrador, to and through the straits of Belle Isle and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company :

> AND that the American fishermen shall also have liberty for ever, to dry and cure fish in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground:
>
> AND the United States hereby renounce for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within 3 marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits:
>
> PROVIDED, HOWEVER, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

Treaty of 1783 and 1818 compared.—It will be observed that the liberties granted by the treaty of 1818 are far more restricted than those granted in 1783. In 1818 Great Britain was in a very different position from that which she had occupied thirty-five years before. The long wars with Napoleon were over, and Napoleon himself was a prisoner at St Helena. Great Britain was in a position to dictate terms even to the United States, and we find her negotiators taking an attitude far different from the one their predecessors had taken in 1783. The United States, on the other hand, dropped the extreme pretensions previously put forward. In 1783 John Adams, the father, had pushed the American claims as grounded on pure right alone. In 1818 John Quincy Adams, the son, was forced to urge 'considerations of policy and expediency' as an inducement to Great Britain to recognize such right. And so when the treaty finally came to be signed, Great Britain's position, shortly

stated, was: 'We will not recognize your extreme pretension of right in these fisheries, but are willing to delimit to you certain definite extents of coastal territory in British North America, where your privilege of fishing in common with British subjects shall continue, but only on condition that you distinctly renounce the right or claim to fish within three miles of all the rest of our coasts.' The United States therefore had lost much by this treaty. Formerly, American fishermen could fish anywhere on the British North American coasts; now, they could fish only on certain specified portions. In 1783 they were unrestricted as to distance from land; in 1818, except on the coasts delimited, they could not come within the three-mile limit. In 1783 they could dry and cure their fish anywhere on the coasts of Nova Scotia and Labrador; now, they could exercise such privilege only on a small portion of the Newfoundland coast and Labrador.

Period from 1818 to 1836.—During the eighteen years immediately following the treaty, no serious trouble arose respecting its provisions, although between 1821 and 1824 half a score or more of American sloops were seized in the Bay of Fundy for alleged illegal fishing.

Period from 1836 to 1854.—In 1836, however, Nova Scotia passed what was known as the 'Hovering Act,' which empowered customs officers to board and search any vessel found hovering 'within three marine miles of any of the coasts, bays, creeks and harbours' of that province. All the other provinces passed similar statutes. At this time also the mackerel left the New England coasts and entered the bays of Canada. The question of practical importance at once arose: what is meant by the phrase 'within three marine miles of any of the coasts, bays, creeks and harbours'? When the United States in 1818 renounced the right of taking fish 'on or within three marine miles of any of the coasts, bays, . . . of His Britannic Majesty's dominions in America,' what were the bays in which they gave up the right to fish? From where must be measured the 'three marine miles' referred to in Article 1?

Great Britain took the position that the term 'bays'

was used in the renunciation clause of Article 1, as including all tracts of water on the non-treaty coasts which were known under the name of bays in 1818, and that the three marine miles must be measured from a line drawn between the headlands of those waters. Great Britain claimed that the negotiators of the treaty meant by 'bays' all those waters which, at the time, every fisherman and every mariner knew as bays; and she pointed to the maps published at the time, with the waters in dispute marked as 'bays.'

The United States, on the other hand, early contended that the word 'bays' must be confined to small indentations, that these small bays alone she had renounced in 1818, and that the three marine miles must be measured from a line following the sinuosities of the coast. This theory, if sustained, would give American fishermen access to such great bays as Chaleur Bay—which recedes seventy miles into the interior before narrowing down to a point where it is six miles wide—Miramichi Bay, Egmont Bay, Placentia Bay, Fortune Bay and numerous others. By the same process of reasoning Delaware Bay (eleven miles wide) and Chesapeake Bay (thirteen miles wide at its entrance) would be thrown open to Canada.

Bay of Fundy conceded to Americans.—Where the parties took so widely dissimilar views of their rights, serious trouble was inevitable. The Bay of Fundy was readily accessible to the enterprising fishermen of Gloucester, Massachusetts. They swarmed down on the Nova Scotian coasts every fishing season, and at once ran foul of the colonial interpretation of the treaty of 1818. The colonists had succeeded in inducing the home government to exercise greater activity in patrolling the fishing-grounds. Soon seizures of American fishing vessels began to be made by British cruisers or men-of-war. The *Washington* was seized in the Bay of Fundy at a point over ten miles distant from land, and the *Argus* near Cow Bay off the Cape Breton coast, at a point some twenty-eight miles from land. Each nation vigorously maintained its position. The seizures continued. The difficulty, as the years passed on, became more and more accentuated. Between 1839 and 1845 elaborate diplomatic representations were made between

the two governments, and finally in 1845, after fruitless negotiations, the British government felt that some arrangement must be made at least as far as the Bay of Fundy was concerned.

In that year Lord Aberdeen, the foreign secretary of Great Britain, wrote a letter, which had been prepared as a piece of diplomatic correspondence after the most matured deliberation, in which, while still maintaining the British view on the question of bays, he expressed the willingness of the British government, as a pure matter of grace and concession, to forgo, as far as the Bay of Fundy was concerned, its strict right to exclude American fishermen therefrom, and assented to the use of those waters by American fishermen on the understanding that as to the remaining colonial coasts the claims of these fishermen should cease.

Lord Aberdeen's letter, forwarded on March 10, 1845, to Edward Everett, American minister at London, coupled with the understanding between the two powers that American fishing privileges in the Bay of Fundy should not be included in the points submitted to the arbitrators at The Hague in 1910, practically amounts to a permanent arrangement in favour of the United States. The terms of this letter are sufficiently important to warrant citation:

> Her Majesty's government must still maintain, and in this view they are fortified by high legal authority, that the Bay of Fundy is rightfully claimed by Great Britain as a Bay within the meaning of the treaty of 1818. And they equally maintain the position which was laid down in the note of the undersigned, dated the 15th of April last, that, with regard to the other bays on the British American coasts, no United States' fisherman has, under that convention, the right to fish within three miles of the entrance of such bays as designated by a line drawn from headland to headland at that entrance.
>
> But while her Majesty's government still feel themselves bound to maintain these positions as a matter of right, they are nevertheless not insensible to the advantages which would accrue to both countries from relaxation of the exercise of that right; to the United States as conferring a material benefit on their fishing

> trade ; and to Great Britain and the United States, conjointly and equally, by the removal of a fertile source of disagreement between them.
>
> Her Majesty's government are also anxious, at the same time that they uphold the just claims of the British crown, to evince by every reasonable concession their desire to act liberally and amicably towards the United States.
>
> The undersigned has accordingly much pleasure in announcing to Mr Everett, the determination to which her Majesty's government have come to relax in favor of the United States' fishermen, that right which Great Britain has hitherto exercised, of excluding those fishermen from the British portion of the Bay of Fundy, and they are prepared to direct their colonial authorities to allow henceforward the United States' fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach, except in the cases specified in the treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick.

The American government, while courteously acknowledging the spirit that had moved the writing of the letter, refused to accept as a mere favour that for which they had so long and strenuously contended as due them as of right under the convention. Ever since the writing of that letter in 1845, American fishermen have continued to fish in the Bay of Fundy as waters open to them. It is now most unlikely that any British government would revert to the strict construction of the treaty, as far as the Bay of Fundy is concerned, and attempt to exclude American fishermen from it. When the treaty that provided for the submission of the whole fishery dispute to arbitration was signed, it was expressly agreed between the parties, by an exchange of notes, that any question as to American claims in the Bay of Fundy should be excluded. That point was left untouched by the arbitration.

The United States minister had refused to accept the relaxation thus made as a mere favour, and he wrote to his government that he anticipated an even more liberal construction of the treaty by Great Britain. Everett's expectation proved well founded. Having given up the Bay of

Fundy, Great Britain seemed disposed to be generous, and in May 1845 the governor of Nova Scotia was informed that 'Her Majesty's Government deem it advisable for the interests of both countries to relax the strict rule of exclusion exercised by Great Britain over the fishing vessels of the United States entering the bays of the sea on the British North American Coast.'

The proposal to throw open all the bays of British North America to American fishermen provoked the most vigorous protest from Nova Scotia. That colony's views on the subject were embodied in a report of its attorney-general, which began with the statement that 'the concession of a right to fish in the Bay of Fundy has been followed by the anticipated consequence—the demand for more extended surrenders based upon what has already been gained.' This remonstrance had the desired effect, and the governor of Nova Scotia was informed that Her Majesty's government had abandoned its original intention and would adhere to the strict letter of the treaty, except with regard to the Bay of Fundy.

Great Britain having declined to make a relaxation as to bays other than the Bay of Fundy, the parties reverted to the strict letter of their rights. In 1852 the British government was again compelled to dispatch a considerable armed force to protect colonial rights. Each of the provinces sent cruisers. Matters looked serious. Hot words passed in the United States Senate, and an American force was sent to the fishery grounds.

To complete the history of the period prior to the Reciprocity Treaty of 1854, in connection with this subject of 'bays' there should be mentioned two incidents which in subsequent years were the cause of much embarrassment to those seeking to support the claims of their respective governments—an extraordinary blunder on the part of Great Britain and a damaging admission on the part of the United States.

Great Britain's Blunder.—It was the people of Nova Scotia who had originated the 'headland' theory, and, for the purpose of ascertaining whether the theory was tenable,

the House of Assembly of Nova Scotia in April 1841 prepared a case-stated for the purpose of being referred to the law-officers of the crown in England.

The opinion of the law-officers of the crown was rendered in August 1841. On the question of bays, in so far as now material, it was as follows:

> We are of opinion that by the terms of the treaty American citizens are excluded from the right of fishing within three miles of the Coast of British America, and that the prescribed distance of three miles is to be measured from the headland or extreme point of land next the sea of the coast, or the entrance of the bays and not from the interior of such bays . . . *as we are of opinion the term headland is used in the treaty* to express the part of land we have before mentioned, excluding the interior of the bays and the indents of the coast.

It is noteworthy that the law-officers of the crown did not base their decision upon any historic claim of jurisdiction by Great Britain over the waters in dispute; or upon any examination into the negotiations antedating and leading up to the treaty of 1818 for the purpose of obtaining the true interpretation of this clause; nor did their opinion rest on any general principles of international law establishing the extent of jurisdiction over the territorial sea. They relied solely on the alleged fact that the word *headland* was used in the treaty in accordance with the British construction.

Unfortunately for their accuracy and reputation, the word *headland* is not in the treaty. The law-officers made the grievous error of adopting the words of the case-stated instead of examining and passing upon the actual words of the treaty. The 'opinion' was not communicated to the United States at the time and was not therefore made a subject of diplomatic discussion. The incident is of importance, for it was admittedly 'this high legal authority' which was mainly instrumental in leading the home government to adopt the colonial construction of the treaty, and in this respect of course it rested upon an imaginary basis. The opinion of the law-officers was reverted to with keen

satisfaction by American diplomatists and counsel in subsequent years.

The Damaging Admission by the United States.—The admission, prejudicial to the contention of the United States, was made by Daniel Webster, then secretary of state, in July 1852. At this time cruisers of both powers were patrolling the fishing-grounds, and the controversy had become so acute that the United States felt it necessary to assume some clearly defined attitude towards the 'bay' question. On July 6, therefore, Webster, in his official capacity as secretary of state of the United States charged with the conduct of her foreign affairs, published a proclamation for the avowed purpose 'that American fishermen might perceive how the case at present stands and be on their guard.' In this proclamation he made the remarkable admission that :

> It would appear that by *a strict and rigid construction of this article, fishing vessels of the United States are precluded from entering into the bays or harbors of the British provinces* except for the purposes of shelter, repairing damages and obtaining wood and water. . . . *It was undoubtedly an oversight in the Convention of 1818 to make so large a concession to England.*

That Webster was right is proved by the award of the arbitrators at The Hague in 1910, but his injudicious admission of the correctness of the British construction of the treaty was in after years a source of constant embarrassment to the United States, and in fact was never successfully explained away. In the printed case, counter-case and argument submitted by the United States in connection with The Hague Arbitration, an attempt was made to justify the 'Webster proclamation,' but, in his argument which closed the proceedings, Senator Root had finally to admit that it was quite inexplicable on ordinary grounds, and that it must be ascribed to the excitement induced by the disease that resulted in Webster's death a few weeks after its publication.

Period from 1854 to 1871.—Attempts to harmonize the views of the two countries through diplomatic channels having failed, in 1854 it was determined to settle the whole

dispute, if possible, by making a new treaty. Accordingly the treaty known as the 'Reciprocity Treaty' was entered into. It admitted American fishermen to the enjoyment of all British coast fisheries in the Atlantic in exchange for the admission of British fishermen into certain United States coast fisheries, and it provided also for reciprocal abatement in customs dues.

In December 1854 the joint commission, established for the settlement of claims for damages for the seizures of the *Washington* and the *Argus* by Great Britain, rendered its award, both of these cases being decided in favour of the United States by the umpire—Joshua Bates. The *Washington* had been seized in 1843 in the Bay of Fundy at a point between ten and twenty miles distant from land, and the legality of the seizure was questioned by the United States. The umpire awarded the owners of the *Washington* $3000 damages, mainly on the ground that as one of the headlands of the Bay of Fundy was in the United States it was not a British bay. The *Argus* had been seized in 1844 at a point twenty-eight miles distant from land, and admittedly outside the three-mile line drawn between the headlands of Cow Bay. In the case of the *Argus* the owners were awarded $2000 damages. In both cases, therefore, the theory of the headlands was not squarely presented, and the decision of the umpire left the question still an open one.

During the currency of the Reciprocity Treaty of 1854, inasmuch as the inhabitants of the United States were by its terms permitted to resort to all the inshore fisheries without any limitation as to the distance from shore, no question of dispute arose involving the fisheries. In March 1866 the treaty was terminated by notice given by the United States, in accordance with its provisions, and American fishermen reverted to the treaty of 1818 as the measure of their right on the non-treaty coasts.

From 1866 to 1869 the Canadian government resorted to the system of issuing licences permitting American fishermen to use the inshore fisheries. The system was not successful and was discontinued in 1870.

In the years immediately following the abrogation of

the Reciprocity Treaty of 1854, Canadian negotiators made several journeys to Washington in an attempt to conclude a new treaty. They were unsuccessful. The tremendous fiscal necessities of the United States at this time, occasioned by the Civil War which had just come to a close, left no choice to the government but to raise the tariff wall. A general abatement in customs dues by the United States, in favour of Canada, was at this time altogether impossible.

Washington Treaty, 1871.—However, in 1871 Sir Edward Thornton, British minister at Washington, acting under instructions from Lord Granville, then colonial secretary, proposed to the American secretary of state that another attempt should be made to come to a complete understanding with regard at least to the fisheries question. This suggestion of Lord Granville, and the subsequent notes exchanged between the two powers, eventually led to the negotiations resulting in the treaty of May 8, 1871, known as the Treaty of Washington. This treaty extended to the inhabitants of the United States the benefit of all the inshore fisheries without limitation as to distance from shore, and a similar liberty was extended to the subjects of Great Britain, to the sea-coasts and shores of the United States north of the 39th parallel of north latitude. The treaty was made applicable to Newfoundland in 1874. The fisheries articles of the treaty were to remain in force for ten years, and further until the expiration of two years after either power had given notice of its desire to terminate them. These articles were in effect a renewal of the fisheries provisions of the Reciprocity Treaty of 1854; but no provision was made for reciprocity in the exchange of products between the British possessions in North America and the United States, except that fish and fish-oil of all kinds, the product of the other country, were to have free entry. And whereas Great Britain asserted that the fishing liberties accorded to the citizens of the United States were of greater value than those conferred on the citizens of Great Britain, it was provided by Article 22 of the treaty that a commission should be appointed to determine the value of these additional privileges and award compensation if found due. The fisheries clauses of this treaty were

terminated in July 1885, on notice given by the United States.

Period from 1871 to 1885.—In 1877 Great Britain asked for the appointment of the commission agreed upon in Article 22 of the Treaty of Washington, which was to determine the excess value of the privileges accorded to American citizens over those accorded to the citizens of Great Britain. This commission, which was composed of three members—Sir Alexander Galt, chosen by Great Britain; the Hon. H. E. Kellogg of Massachusetts, appointed by the United States; and Maurice Delfosse, Belgian minister at Washington, appointed conjointly by the parties—met at Halifax in June 1877. The case was elaborately argued on both sides. Finally in November of that year by a vote of two to one, the American commissioner dissenting, a decision was rendered which awarded 'the sum of $5,500,000 in gold to be paid by the United States to Great Britain' as the amount of the compensation due her for the use of the fishery privileges for twelve years. It was claimed by the American government that this award was grossly exorbitant. The customs receipts for the four years from 1873 to 1877 showed that the United States had remitted duties on fish amounting to $350,000 a year, and this added to the award made the equivalent of almost $10,000,000 for the use of the inshore fisheries for twelve years. It was said to be, in fact, worth not more than $25,000 a year. Objection was also taken in the United States Senate to the method of the appointment of the neutral commissioner. Finally, after extended deliberation, the award was paid. It must be admitted that the arbitration was decidedly favourable to Great Britain.

Fortune Bay Controversy, 1878.—In January 1878, barely a month after the date of the Halifax award, occurred what is known as 'the Fortune Bay incident.' A number of American fishermen while carrying on their operations in Fortune Bay, in accordance with the Washington Treaty of 1871, were attacked by large and violent mobs of the inhabitants of Newfoundland, were compelled to take up their seines, to release the fish already enclosed and to abandon their fishery. Several of their nets were destroyed. The

justification alleged was that the Americans were violating the provisions of Newfoundland statutes in 'barring' herring in a close season and in fishing on Sunday. The long diplomatic correspondence that ensued ended by the payment of $75,000 to the United States by Great Britain, on the ground that, whatever provocation the inhabitants of Newfoundland had received from the American fishermen, and whether or not those fishermen were in the wrong (as to which both parties maintained their own views), British private citizens had no right to take the law into their own hands.

But although this point is absolutely clear, the incident was the occasion of an important discussion, for the first time, between the two governments as to whether the right to regulate the fisheries existed at all. Thus in 1878, ninety-five years after the treaty of 1783 and sixty years after the treaty of 1818, arose, in a practical way, the question as to how far the treaty rights accorded to American fishermen were affected by local laws and regulations. Shortly stated, the question was, whether or not Canadian and Newfoundland law, appropriate or necessary for the protection and preservation of the fisheries and desirable or necessary on grounds of public order and morality, should be binding upon the fishermen of the United States without their consent. For upwards of two centuries Nova Scotia and Newfoundland had had on their statute books and had been enforcing regulations designed to protect and preserve the immensely valuable fisheries on their coasts. Such laws related to: the care of the spawning-beds during the spawning season; the prohibition of fishing on Sunday; the prohibition of the throwing overboard of offal which infected the waters and poisoned the fish, causing them to desert the Banks; the regulation of the size and kind of nets; prohibition of 'purse seines' and other implements used in carrying on the fishery operations along the coast. Such regulations had always been in force and had never before been questioned by the United States government.

Lord Salisbury, therefore, in 1878, took the position on behalf of Her Majesty's government that the fishery to

which the inhabitants of the United States were admitted in 1783, in 1818, in 1854 and in 1871, was a regulated fishery, and that American fishermen when exercising the privileges accorded them by these treaties must conform with Canadian or Newfoundland law passed in good faith for the protection and preservation of the fisheries. William M. Evarts, United States secretary of state, on the other hand, strenuously maintained that the fishery rights of American citizens conceded by prior treaties were to be exercised wholly free from the restraints and regulations of the statutes of Canada and Newfoundland. This question of the 'right to regulate' was finally submitted to The Hague Tribunal as Question No. 1.

Joint Regulations Proposed.—In the course of the discussion that grew out of the Fortune Bay case, the question of joint regulation of the fisheries came up for consideration, and an attempt was made by both powers to co-operate in an effort to make those regulations a matter of reciprocal convenience and right. But the negotiations fell through.

Modus Vivendi, 1885.—In pursuance of instructions from Congress, the president gave the required notice of the desire of the United States to terminate the fishery articles of the treaty of 1871, and consequently they came to an end on July 1, 1885. As this happened to be the middle of the fishery season, the terms of the treaty were prolonged throughout that year by a *modus vivendi.* The temporary arrangement terminated with the season of 1885, and from 1885 to 1886 there was no formal understanding between the two powers.

Events from 1886 to 1888.—The treaty of 1818 once more became the measure of the rights of both powers. Great Britain immediately proceeded to enforce a strict and literal interpretation of that treaty. The 'Foreign Fishing Vessels Act' was passed by the Canadian government, and instructions were forwarded to the naval officers in command of government cruisers engaged in patrolling the fishing-grounds, to enforce rigidly the three-mile limit rule and seize all vessels found fishing in the prohibited waters. The instructions to the naval officers included a rigorous

command to see that American fishermen obeyed colonial regulations.

But the most noteworthy clause in these instructions was one reminding the commanders that American fishermen had no commercial privileges in Canadian ports on the treaty coasts—the words of the treaty permitting them to enter Canadian or Newfoundland harbours only for certain specified purposes: for shelter, for repairing damages, for purchasing wood, and for obtaining water. The words of the treaty explicitly said:

'Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, *and for no other purpose whatever.*'

The commanders, therefore, were ordered to keep foreign fishing vessels from entering the harbours and bays of Canada for the four legal purposes, from taking advantage thereof, to take fish there, to purchase bait, ice or supplies, or to tranship cargoes or from transacting any business in connection with their fishing operations. It was a privilege of the greatest value to American fishermen, when hundreds of miles away from the base of supplies at Gloucester, Massachusetts, to be able to resort to the ports of Canada and Newfoundland for the purposes above mentioned, and especially, in regard to the fisheries of the Banks in the open sea, for the purpose of purchasing bait. All these privileges were denied them under the interpretation of the treaty now sought to be enforced by the colonial authorities.

The Canadian marine police at once proceeded to enforce a strict observance of the instructions sent them by the department of Marine and Fisheries. In 1886 700 American fishing vessels, and in 1887, 1362 were boarded, some 400 were seized; and many of them were condemned to forfeiture. A period of extreme diplomatic tension followed. In July 1886 the *David J. Adams* was seized in Digby Gut, Nova Scotia, for purchasing bait; the *Thomas F. Bayard* was warned out of Bonne Bay on the western coast of Newfoundland for attempting to do the same; the *Mascot* was

threatened with seizure at Port Amherst, Magdalen Islands, on similar grounds. Thomas F. Bayard, United States secretary of state, in a dispatch to Sir Lionel Sackville-West, British minister at Washington, made these interferences the occasion of a vigorous protest against the Canadian and Newfoundland attitude on the question of the commercial privileges of American fishing vessels. He conceived 'such proceedings to be flagrantly violative of the treaty rights of their citizens, for which the United States expected prompt remedial action by Her Majesty's Government,' and he would ask that 'such instructions may be issued forthwith to the provincial officials of Newfoundland and the Magdalen Islands as will cause the treaty rights of citizens of the United States to be duly respected.'

Daniel Manning, United States secretary of the Treasury, reported that 'while his department protected Canadian fishermen in the use of American ports, the Dominion of Canada brutally excludes American fishermen from Canadian ports.' And he claimed on behalf of the United States that 'American fishing vessels duly authenticated by the Department, and having a permit to "touch and trade," should be permitted to visit Canadian ports, and buy supplies, including bait, and enjoy ordinary commercial privileges, unless such right is withheld in our ports from Canadian vessels.' He complained of 'mediæval restrictions on free navigation'; of 'Canadian inhumanity'; and contended that 'American fishermen were not outcasts,' and that 'they were entitled to the ordinary rights of hospitality which the citizens of every civiiized nation enjoy in the ports of another.'

Reply was made by Lord Rosebery on behalf of Canada and Newfoundland, that the words of the treaty of 1818 were clear and unambiguous. This treaty prohibited American fishing vessels from entering a Canadian or Newfoundland port for any purpose whatever, except for four legal purposes, namely, to obtain wood or water, to repair damages and to seek shelter. This was not only the language of the treaty of 1818, but its true spirit and plain intent. He pointed out that the American negotiators of that treaty had sought to

make the proviso at the end of it to read thus : ' Provided that American fishermen shall be permitted to enter such bays and harbors for the purposes of obtaining shelter, wood, water, *and bait* and for no other purpose whatever,' and the insertion of the words ' and bait ' had been resisted by the British negotiators and struck out.

In this way arose Question No. 7, the question of ' Commercial privileges,' afterwards submitted to The Hague Tribunal for an answer.

Customs Entry.—Two practically new questions, involving the interpretation of the treaty, also arose at this period. In August 1886 the American fishing sloop *Rattler* was boarded while taking shelter in Shelburne Harbour, Nova Scotia, and threatened with seizure unless the captain reported at the Customs House. A score or more of vessels were at once subjected to similar requirements in other ports. Great Britain claimed that the reporting of American fishery vessels at the customs was clearly necessary for the prevention of smuggling. The vast extent of the sea-coasts of Canada and Newfoundland in the Gulf of St Lawrence, their thickly wooded shores, their numerous bays and harbours, the scattered population, the almost constant prevalence of fog, rendered it of the utmost importance that laws against smuggling should be simply but strictly enforced. This could be accomplished only by requiring the master of each vessel to enter and report at customs immediately on arrival. These laws were enforced against colonial vessels, and it was claimed that they should also be observed by fishing vessels of the United States. In exercising their treaty rights they were not, and could not be, independent of the custom laws.

Payment of Light Dues.—At this period of the controversy, American fishing vessels, on the ground no doubt that they were being denied commercial privileges, for the first time refused to pay light dues. This requirement, it was claimed on behalf of Great Britain, involved no unreasonable interference with the exercise of the fishery rights of American fishermen. These dues were payable by all vessels of whatever description or nationality, with the

exception of coasting and fishing vessels of the colonies, whose owners paid taxes for the upkeep of these lighthouses, and it was not unfair or any discrimination to ask American vessels to contribute towards their maintenance.

The American reply to the British contention on these two points was :

'The Government of Newfoundland cannot be permitted to make entry and clearance at a Newfoundland customs house and the payment of a tax for the support of Newfoundland lighthouses, conditions to the exercise of the American right of fishing.'

In this way arose Questions Nos. 3 and 4, afterwards submitted to The Hague Tribunal for an answer.

The seizures still continued. American authorities at this time, drawing up a statement of their own complaints against Canadian authorities, calculated that between 1818 and 1888, 97 of their vessels had been seized and condemned, and during the years 1886 and 1887 over 2000 had been boarded or seized and in many instances forfeited. In only one case, it was claimed, that of the *Washington* in 1853, had reparation been made by Great Britain. The situation became more and more acute. For several weeks the fishery question was an all-absorbing topic and threats of war were freely made. Canadian cruisers diligently patrolled the fishing-grounds. The United States also sent a war-vessel with instructions to watch over American interests. The indignation in Congress found expression in two bills looking toward retaliation. The one introduced in the House of Representatives prohibited all commercial intercourse with Canada by land or water. The Senate would not agree to so radical a measure, and finally passed a statute giving the president of the United States power, in his discretion, whenever he should be satisfied that American fishermen were denied or abridged in the enjoyment of any rights secured them by treaty or law, or unjustly vexed or harassed in the treaty waters or ports of Canada or Newfoundland, or subjected to unreasonable restrictions or regulations in respect of their rights, to deny to vessels of Canada or Newfoundland any entrance into the waters or ports of the United

States ; and also to deny entry into any port or place of the United States of fresh fish or salt fish or of any product of Canada or Newfoundland coming from those dominions into the United States. The president has never exercised the retaliatory power thus conferred upon him.

Negotiations of 1888.—An elaborate diplomatic correspondence took place during the years 1886, 1887 and 1888. Neither side would yield its convictions to the reasoning of the other. This being exhausted, there was no resource left to nations disposed to peace but a compromise. Great Britain was willing to give up something. The United States consented to take less than the whole. Many expressions are to be found in the diplomatic correspondence of this time of a sincere desire to settle the entire controversy by entering into an arrangement for adjusting the fisheries question on some new basis mutually acceptable. In recognition of this situation, Bayard, the United States secretary of state, forwarded to Lord Iddesleigh a draft agreement ' in the hope that it would be found to contain a satisfactory basis for the solution of existing difficulties, and assist in securing an assured settlement of the long-vexed question of the North Atlantic fisheries.'

The main feature of Bayard's proposal was the appointment of a mixed commission for the purpose of deciding upon the meaning and scope of the disputed provisions of the treaty of 1818. It was proposed that the commission should negotiate a new treaty, and for this purpose Great Britain appointed her plenipotentiaries, Joseph Chamberlain, Sir Charles Tupper and Sir Lionel Sackville-West.

These plenipotentiaries, in conjunction with those of the United States, reached an agreement for a treaty on February 15, 1888, called the Chamberlain-Bayard Treaty ; but this proposed treaty, though it passed in the House of Representatives, when submitted to the Senate failed to secure approval, and therefore never became effectual. Another attempt to settle ' the long-vexed question of the North Atlantic fisheries ' had failed.

Chamberlain-Bayard Treaty, 1888.—This so-called Chamberlain-Bayard Treaty of 1888, though never ratified by

the United States government, nevertheless marks an important epoch in the history of the controversy. Without going as far as to recognize the theory upon which the British contention on the question of bays was based, yet, for all practical purposes, it gave effect to this contention by specifically delimiting the lines beyond which American fishermen could not go in Canadian and Newfoundland waters. In practically all the important bays the 'headland principle' was applied. The limits of exclusion of American fishing vessels were thus established: in Chaleur Bay by a line measuring 16 miles from headland to headland; Miramichi Bay, 17⅓ miles; Fortune Bay, 10 and 11 miles; Placentia Bay, 11 miles; Mira Bay, 9 miles; St. Peter's Bay, 9 miles. And as to bays and harbours not specifically provided for in the treaty, the three marine miles were to be measured from a straight line drawn across the bay or harbour at the point nearest the entrance where it was ten marine miles wide.

This was the compromise attempted on the question of bays.

The treaty also provided that whenever the United States should remove the customs duties upon fish and certain fish products, then:

'The privilege of entering the ports, bays, and harbours of the Atlantic coast of Canada and Newfoundland shall be granted to United States fishing vessels by annual licences, free of charge, for the following purposes, namely:

'1. The purchase of provisions, bait, ice, seines, and other supplies and outfits;

'2. Transhipment of catch, for transport by any means of conveyance;

'3. Shipping of crews.'

This was the compromise attempted on the question of commercial privileges.

Modus Vivendi, 1888.—As has been stated, the United States Senate declined to ratify this convention and therefore it never became operative. But the wisdom of the negotiators had provided a *modus vivendi*, pending legislative action with regard to the convention, and, in order to avoid

any difficulty during the intervening months, it was agreed between the parties that, for a period not exceeding two years from date, American fishing vessels should be permitted to enter freely Canadian harbours and buy supplies, bait, outfit; to tranship; and generally to exercise the commercial privileges of Canadian ports to the full extent to which the vessels of any foreign country could be given them. This temporary arrangement (as far at least as Canada is concerned) has simply continued from that day to this. When the treaty to which the arrangement was subsidiary was rejected by the Senate of the United States, and fell entirely to the ground, the intervening or temporary arrangement did not necessarily fall with it. It has been rescinded by neither party, and by simple acquiescence it has continued till the present time. Accordingly, on the payment of an annual fee of $1.50 per ton to the Canadian government, American fishing vessels are at liberty to resort to Canadian ports and bays.

Period from 1888 to 1905.—The year 1888 marks the end of the controversy between Canada and the United States until the formal arbitration. Not so in the case of Newfoundland: and it was the persistence with which that colony clung to its rights, as it saw them, under the treaty of 1818, and the vigorous methods it took for the protection of these rights, that eventually led to the submission of the whole fisheries question to arbitration in 1909.

Bond-Blaine Treaty, 1891.—What Newfoundland desired above all was a market for her fish and fish products—access to the markets of the United States, free from customs duties. In accordance with this object, in 1891 a convention was entered into by Sir Robert Bond, on behalf of Newfoundland, and James G. Blaine, on behalf of the United States, which provided for the admission of dry cod-fish, cod-oil, etc., free of duty into the United States in return for the privilege granted American fishing vessels of purchasing bait and supplies and of touching and trading and exercising commercial privileges generally. Canada protested against the adoption of this treaty; Great Britain found herself unable to ratify it, and it fell to the ground.

Hay-Bond Treaty of 1902.—But Newfoundland had not given up hope of reciprocal free trade with the United States, and in 1902 Sir Robert Bond entered into negotiations with John Hay, secretary of state, for a new treaty. Its terms were practically the same as those of the 1891 treaty, providing for reciprocal freedom from customs duties of certain articles, and for permission to American fishermen to purchase bait and other supplies in ports of Newfoundland. But this treaty also failed to receive confirmation in the United States Senate in 1904.

The Newfoundland Controversy, 1905-7.—Failing in his attempts to obtain reciprocity in trade with the United States by means of treaty agreements, the premier of Newfoundland had recourse to an entirely new policy. Since 1893 American fishing vessels had been allowed by Newfoundland to purchase bait and supplies and to ship crews, if duly licensed to do so. In 1905, however, immediately after the failure of the Hay-Bond treaty, the Newfoundland government passed what is known as the 'Foreign Fishing Vessels Act,' which put an end to the licence system, and by the most stringent provisions prohibited absolutely within Newfoundland waters the sale of bait, lines and supplies to foreign fishing vessels and the hiring of crews by such vessels. The purpose of this new policy, tacitly admitted by Sir Robert Bond, was 'to bring the fishing interests of Gloucester and New England to a realization of their dependence on the bait supplies of this colony'; to show them 'that the fishermen of this colony had the whip-hand in regard to the fisheries of British North America,' and to compel the American government by pressure thus exerted to open the American market to Newfoundland fish and fish products, free of duty, in exchange for more extensive fishing and commercial privileges.

The sale of bait and supplies to American fishing vessels being prohibited in Newfoundland, American fishermen after the act of 1905 tried to evade the effect of that prohibition by engaging Newfoundlanders to fish for them. Instead of buying the fish which the Newfoundlanders had caught, they, in order to avoid

the operation of the local law, proceeded to employ Newfoundlanders.

But the legislature of Newfoundland was equal to the occasion, and in 1906 passed an act prohibiting Newfoundlanders from taking employment in any foreign fishing vessel, and subjecting any foreign vessel employing them to a fine of $100, or forfeiture, in the discretion of the magistrate.

These circumstances gave rise to the controversy as to whether, under the treaty, United States fishermen were entitled to employ persons other than the inhabitants of the United States in the prosecution of the fisheries. Sir Robert Bond turned up the treaty and found that the liberty to take fish was accorded '*to the inhabitants of the United States*,' and the liberty to dry fish was given '*to American fishermen*.' The Newfoundland position, therefore, and the position of the British government was that the liberty to fish was restricted '*to the inhabitants of the United States*,' and that under the treaty, strictly interpreted, Americans had no right to bring into British waters on their fishing vessels for fishing purposes, Norwegians, Swedes, Danes, etc., or any person who was not an inhabitant of the United States, and of course this would include Newfoundlanders, if the government of that colony chose to prohibit them from taking employment on American vessels.

In this way arose Question No. 2, submitted to The Hague Tribunal for an answer.

Question No. 6.—The last question that arose concerning the interpretation of the treaty of 1818 is an entirely new one, and a somewhat close reading of Article 1 is required for its appreciation. It was originated by Sir Robert Bond, premier of Newfoundland, in a debate in the House of Assembly of that colony on April 7, 1905, eighty-seven years subsequent to the ratification of the treaty of 1818.

A perusal of the fishery article of the treaty on page 684 will show that while it grants to American fishermen liberty to take fish 'on the *coasts*, *bays*, *harbours* and *creeks* from Mount Joly on the southern coast of Labrador,' etc., it gives liberty on the '*coast*' merely of Newfoundland and on the '*shores*' of the Magdalen Islands. And the question

is, whether the more restricted liberty in these two localities is to be construed as meaning the same as the more ample liberty on the Labrador coast.

Stated in another form, Sir Robert Bond's argument was based on the use of the word '*coasts*' followed by the words 'bays, harbours and creeks' in defining the liberty to fish on the Labrador coast, and on the use of the word '*coast*' alone when speaking of the liberty on the Island of Newfoundland, and the use of the word '*shores*' alone when speaking of the liberty on the Magdalen Islands.

The effect of the contention would be that Americans could fish on the 'coast' of Newfoundland specified as being open to them under the treaty, but could not enter any of the 'bays, creeks or harbours' for that purpose. There was evidence to show that Americans had been fishing in the bays on the western coast of Newfoundland as early as 1823, in the belief that they had a right to do so, but it was reserved for Sir Robert Bond to discover that they had slept in peace for nigh a century in blissful ignorance of their insecurity. Not a suggestion is to be found in the diplomatic records in regard to the point. It is a question which all the years of debate had never brought to the surface; but Sir Robert Bond refused to assent to the submission of the controversy to arbitration unless this belated contention were included. Both powers finally agreed.

In this way arose Question No. 6, submitted to The Hague Tribunal for an answer.

Modus Vivendi of 1906 and 1907.—The passage of the Foreign Fishing Vessels Act of 1906 in the legislature of Newfoundland was the subject of so vigorous a protest on the part of the government of the United States, that imperial assent was withheld and the measure never became operative. An exchange of important diplomatic notes followed between the United States secretary of state, Elihu Root, and Sir Edward Grey, which, starting merely with a discussion of the right of American fishing captains to hire Newfoundlanders, finally resulted in the opening up of the entire controversy.

The wide divergence of the views taken by the two

governments, as disclosed in the correspondence, showed the hopelessness of expecting an immediate settlement of the various questions at issue; but the willingness of both to come to a temporary settlement, at least, was exhibited in a *modus vivendi*, to take effect during the fishing season of 1906. At the end of that year it was renewed in practically the same form for 1907.

In June 1907 Sir Edward Grey sent a dispatch to the American minister at London, Whitelaw Reid, summing up the views of Great Britain, and the propositions there stated were so much in conflict with the views of the United States government on the subject that the task of reconciling them seemed hopeless. Reid then wrote to Sir Edward Grey: 'In this conviction my government authorizes me, and I now have the honor to propose a reference of the pending questions under the Treaty of 1818 to Arbitration before The Hague Tribunal.' This was agreed to by Great Britain, and, in January 1909, the treaty agreement providing for the submission was signed.

The Arbitration before The Hague Tribunal

It was agreed that all points in controversy should be submitted in the form of seven questions, in accordance with the provisions of the convention for the settlement of international disputes, concluded at the second Peace conference at The Hague in 1907. The tribunal of arbitration was to be chosen from the general list of members of the permanent court at The Hague. The United States chose George Grey, judge of the United States Circuit Court of Appeal; Great Britain chose Sir Charles Fitzpatrick, chief justice of Canada; the two powers agreed upon Dr. H. Lammasch, professor of international law at the University of Vienna, member of the upper house of the Austrian parliament, as president, and on Jonkheer A. F. De Savornin Lohman, minister of state of the Netherlands, and Luis M. Drago, former minister of Foreign Affairs of the Argentine Republic, as members. All the proceedings, including the oral argument of counsel, were to be in English. Each side was to submit a printed case,

counter-case and argument. The tribunal assembled at The Hague on June 1, 1910. The oral argument of counsel, four on each side, was not completed until August 12, and on September 7 the arbitrators rendered the award.

Question 1.—The most important question related to the right to regulate the fisheries in treaty waters. The greatest difficulty was experienced in settling the form of the question. Shortly stated it was this: Has Great Britain the right, without the consent of the United States, to regulate, in a reasonable manner, the fishermen of both nations in their enjoyment of the common fishery?

The full text of the question is as follows:

> To what extent are the following contentions or either of them justified?
>
> *It is contended on the part of Great Britain* that the exercise of the liberty to take fish referred to in the said article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance—
>
> (*a*) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said Article 1 the inhabitants of the United States have therein in common with British subjects;
>
> (*b*) Desirable on grounds of public order and morals;
>
> (*c*) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly an advantage to the former over the latter class.
>
> *It is contended on the part of the United States* that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations

in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character—

(*a*) Unless they are appropriate and necessary for the production and preservation of the common rights in such fisheries and the exercise thereof; and

(*b*) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(*c*) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

The form in which the question was submitted to the tribunal is exceptional in international arbitration. Instead of asking the broad question, the submission was made by presenting to the tribunal the respective contentions of both powers and asking it to determine to what extent either the one or the other was justified. This course was adopted because it was the only one that could reach any result. Where the starting-points were so far apart, and the contentions of the parties were so utterly different and irreconcilable, the device had ultimately to be adopted of having each side state its own contention and leaving the tribunal to say what was the true meaning of the treaty.

The two parties, in fact, approached the subject of the first question from entirely different points of view. Great Britain approached it from the standpoint of her sovereignty. The United States approached it from the standpoint of her granted right. And, the two approaching the subject thus from different points, there came a line of cleavage between them, and it rested with the tribunal to clearly define the situation.

The Arguments.—In perusing the treaty of 1818, it will have been observed that it contains no explicit disposition in regard to the right of regulating the fishery, reasonable

or otherwise ; it neither reserves this right in express terms, nor refers to it in any way. And considering that the fisheries, which were to be subject to regulation, are in waters over which the territorial jurisdiction of Great Britain normally extends, the burden fell upon the United States to establish the proposition that the full exercise of this sovereign right had been voluntarily restricted by Great Britain in the treaty of 1818. In other words, since Great Britain was the owner of the coasts to which the fisheries were appurtenant, and those fisheries were within her jurisdiction, she would ordinarily have the power to pass laws for their regulation ; and the United States had therefore to show that she had in some way restricted herself from so doing. Now such restriction, it is conceivable, could arise in two ways : either by an actual transfer by Great Britain of a portion of her sovereign rights over the coastal waters defined in the treaty, or by an obligation on her part to refrain from exercising her sovereignty in so far as this would restrict in any way the enjoyment by American fishermen of their liberties in the treaty waters.

The United States in its printed and oral arguments advanced both these theories. First, it based its contention upon a transfer by Great Britain of sovereign rights, and this involved a full discussion of the technical doctrine of international servitudes. This branch of the oral argument was elaborately and exhaustively discussed by Senator Turner in his opening address on behalf of the United States. The words of every international writer of authority, past and present, of every country of the world were searched and their opinions were laid before the tribunal.

This branch of the American argument failed absolutely. The doctrine that the fishery liberty granted to the inhabitants of the United States was an international servitude had been reserved by American counsel until very late in the proceedings, and was something of a *coup*. It had never been raised in the diplomatic discussions which had been carried on for upwards of a century and a quarter by the keenest minds on both sides of the Atlantic. It had received no mention in the American printed case or counter-case,

and was first raised in the printed argument, one month before the assembling of the tribunal. The contention was unequivocally rejected by the tribunal. It was not supported in a single particular.

The alternative contention of the United States was: that in case an international servitude did not exist, in case Great Britain had not transferred a portion of her sovereignty to the United States and thus given that country a voice in the making of regulations while restricting her own, Great Britain had nevertheless put herself under an obligation to refrain from exercising her sovereignty in an unreasonable manner; that although Great Britain possessed the right of territorial jurisdiction over the fishery waters, there was established by the treaty a line beyond which the legislative and executive authority of Great Britain could not go without violating the treaty; that the determination of what was reasonable regulation, which fixed the line, was a matter of opinion and judgment; that neither Great Britain nor a British colony was competent to act as sole judge of reasonableness, because they would undoubtedly be influenced by local interest and prejudice, giving the advantage to their own nation, and that therefore in equity there should be an agreement between the United States and Great Britain as to the reasonableness of a regulation; and furthermore, since such mutuality was the only possible security to Americans from unjust restraint, it must be implied in the treaty of 1818.

This feature of the United States contention was strenuously urged by Senator Root in his argument which closed the proceedings at The Hague. But it was completely rejected by the tribunal. The decision of the tribunal on this point was reached only after the most exhaustive study of diplomatic correspondence, statutes and treaties, which, for a period of over a hundred years, had marked the course of the controversy. Every ground upon which the view of the United States on this branch of the case could by any possibility be supported, was examined by the arbitrators, and in its turn rejected. Shortly stated, the four chief reasons for its dismissal in the award were:

1. Because every state is bound to execute the obligations of a treaty in good faith, and no reason has been shown why this treaty of 1818, in this respect, should be considered as different from others.

2. Because the exercise of a right of consent by the United States would predicate an abandonment by Great Britain of her independence to that extent, which has not been proved.

3. Because on a true construction of the treaty the question is not whether the United States agreed that Great Britain should retain the right to legislate with regard to the fisheries in her own territory; but whether the treaty contains an abdication by Great Britain of the right, which Great Britain as the sovereign power undoubtedly possessed when the treaty was made, to regulate those fisheries; and there are no words contained in the treaty to justify the assumption that Great Britain's sovereignty over its territory was in any way affected or that any part of it was transferred to the United States.

4. Because to hold that the United States had a voice in the preparation of fishery regulations involves the recognition of a right to participate in the internal legislation of Great Britain and her colonies, and to that extent would reduce them to a state of dependence.

Therefore the tribunal decided and awarded:

> *The Award.*—The right of Great Britain to make regulations without the consent of the United States, as to the exercise of the liberty to take fish referred to in Article 1 of the treaty of October 20, 1818, in the form of municipal laws, ordinances or rules of Great Britain, Canada, or Newfoundland is inherent to the sovereignty of Great Britain.
>
> The exercise of that right by Great Britain is, however, limited by the said treaty in respect of the said liberties therein granted to the inhabitants of the United States, in that such regulations must be made *bona fide* and must not be in violation of the said treaty.

In other words, it would be incompetent for Great Britain or her colonies to derogate from the treaty itself by dis-

criminatory legislation calculated to whittle away or lessen the liberties that were given under the treaty to the United States; but so long as the regulations were made in good faith and not in violation of the treaty, they are regulations which it is the inherent sovereign right of Great Britain and her colonies to exact, and which must be observed by all men regardless of their nationality. The effect of the award on Question 1 is therefore to preserve inviolate the sovereignty of Great Britain; she alone, or her colonies, can pass regulations, and without the consent or concurrence of the United States. But inasmuch as Great Britain had unequivocally admitted, both in her written argument and through her counsel in their oral arguments, that her right to regulate was limited to '*reasonable regulation*,' and in view of the fact that Great Britain had clearly assumed the position, by the form in which she had agreed to present this question to arbitration, to submit the reasonableness of any future legislation to an impartial arbitral test in case the United States objected, therefore the tribunal, in accordance with these admissions and Articles 3 and 4 of the special agreement for arbitration, instituted a mixed commission of experts, consisting of a national of each party and a non-national named in the award, to pass on the reasonableness of fishery regulations applicable to Americans in treaty waters.

As far as Canadian regulations are concerned, this board will not have to be convened (for the present at least). In January 1911 an agreement was easily reached with the United States government as to existing regulations. Newfoundland was not a party to this arrangement.

With regard to future regulations, the tribunal recommended (it had no power to do more) that Canada and Newfoundland should give two months' notice of intention to enact new laws, and that these, if objected to by the United States, should be passed upon by a permanent mixed fishery commission composed of two nationals and a non-national umpire, each appointed for a term of five years. This is a recommendation merely, and under the award the question of 'reasonableness' would ultimately have to be submitted to The Hague Tribunal itself.

Question No. 5.—'From where must be measured the "three marine miles of any of the coasts, bays, creeks or harbours" referred to in the said article?'

This question of 'bays' is the shortest but possibly the most important of the seven.

The Argument.—The parties had no difficulty in agreeing that on straight or unindented coasts the three marine miles should be drawn 'from the shore line at low tide.' The question was as to indented coasts or bays. When the United States in 1818 renounced 'forever' any liberty claimed to take fish 'on or within three marine miles of any of the coasts, *bays*, creeks or harbours of His Britannic Majesty's Dominions in America not included in the above-mentioned limits,' what were the bays they renounced the right to fish in? From where was the limit of three marine miles to be measured in respect to bays?

Now, the historic contention of the United States was that the three marine miles should follow all the windings and sinuosities of the shore, dipping deep into the bottoms or extremities of all the bays. This interpretation would have resulted in reading the word 'bays' out of the treaty altogether, and the argument was changed for consistency's sake to this: that the phrase in question must be read as including only those bays that were under the territorial sovereignty of Great Britain in 1818, and that waters were 'territorial' only if the distance across their mouths was six miles or less. Stated in another form, the United States' contention was that it was only the small bays, the six-mile bays, in which they had renounced the right to fish. The six-mile theory is thus explained. The three-mile lines following the winding of the coast, drawing near to each other from opposite directions, would necessarily converge and meet at a point where the body of water was only six miles wide, and it was from this point that the three miles should be measured.

In support of their contention, counsel for the United States cited an imposing array of authorities to show that the limit of jurisdiction of a nation over marginal seas was in 1818 fixed at the range of cannon-shot from the shore,

which did not then exceed three marine miles, and as a result, that line was arbitrarily taken as the line of jurisdiction. In a word, the American contention was that the same rule should apply to bays as to unindented coasts.

Recognizing the weakness of this contention as a matter of law, United States counsel had recourse to an elaborate examination of the negotiations preceding the treaty, in an endeavour to show that the intention of the negotiations was in accordance with their interpretation.

Great Britain, on the other hand, took the position that, irrespective of the existence of any three-mile rule in 1818, the treaty, if read naturally, meant exactly what it said, and referred to bays in general, that is the geographical bays, without regard to their form or width, and that all bodies of water named on the maps of the period 'bays, creeks or harbours,' or commonly known as such, were the ones in which the United States renounced its rights of fishery. And as a subsidiary argument, if the phrase demanded interpretation in a juristic sense, British counsel contended that the only intelligible principle enumerated by the authorities on international law was that of Grotius, namely, that a bay was not known by the width of its headlands alone but by the proportion that the width of its headlands bears to the depth and extent of coast-line within its headlands, and they argued that this principle should be applied to the case.

The Award.—The tribunal (Dr Drago, the arbitrator from Argentina, alone dissenting) decided and awarded:

'In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.'

But considering that this answer while correct in principle was not entirely satisfactory as to its practical applicability, the tribunal proceeded to recommend for the acceptance of both powers a series of lines drawn from headland to headland of the bays in dispute, marking out

with definiteness the point beyond which American fishermen could not go. These lines are the same as those adopted in the Chamberlain-Bayard Treaty of 1888, but rejected by the United States Senate, and they give all the important bays to Great Britain.

On this most important question (Question 5), therefore, Great Britain was entirely successful. The tribunal in its award, after dealing with the various arguments advanced by the United States, rejected them all.

The main contention of the United States that the words 'coasts, bays, creeks and harbours' were used in the treaty only to express different parts of the coast, and were intended to express and be equivalent to the word 'coast' whereby the three marine miles should be measured from the sinuosities of the coast, was rejected for two principal reasons:

1. Because it is a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose, and the American interpretation would lead to the result, practically, of reading the words 'bays, coasts and harbours' out of the treaty;

2. Because the tribunal is unable to understand the term 'bays' in the renunciatory clause in other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.

The contention that the renunciation made by the United States applied only to bays six miles or less in width, those alone being territorial bays, was rejected 'because the opinion of jurists and publicists quoted in the proceedings conduced to the opinion that speaking generally the three mile rule should not be strictly and systematically applied to bays.' Nor, according to the tribunal, was it shown, by the documents and correspondence submitted to it, that the application of the three-mile rule to bays was present in the minds of the negotiators in 1818. It was evident that the three-mile rule is not applied strictly to bays by the United States or any other power. It was in fact recognized by the United States

that bays stand apart, and that in respect of them territorial jurisdiction may be exercised farther than the marginal belt in the case of Delaware and Chesapeake bays.

The award also states that:

'The negotiators of the treaty of 1818 probably did not trouble themselves with such subtle theories concerning the notion of "bays"; they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty.'

Hudson Bay is not considered in the award. By agreement it was expressly excluded from the scope of this arbitration.

Question No. 2.—'Have the inhabitants of the United States, while exercising the liberties referred to in said article,[1] a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?'

The question related to the right of the inhabitants of the United States, while enjoying their fishing liberties on the treaty coasts, to employ non-inhabitants as members of the crews of their vessels. It turned on two phrases in the treaty of 1818, namely: 'inhabitants of the United States' and 'American citizens.'

The tribunal decided and awarded:

> Now therefore, in view of the preceding considerations this Tribunal is of opinion that the inhabitants of the United States while exercising the liberties referred to in the said Article have a right to employ, as members of the fishing crews of their vessels, persons not inhabitants of the United States.
>
> But in view of the preceding considerations the Tribunal, to prevent any misunderstanding as to the effect of its award, expresses the opinion that non-inhabitants employed as members of the fishing crews of the United States vessels derive no benefit or immunity from the Treaty, and it is so decided and awarded.

This answer is decidedly unsatisfactory. It is difficult to apprehend exactly the effect of it. Americans may employ non-inhabitants, but these derive no immunity from the treaty. This portion of the award, it is clear, does not,

[1] Article 1 of the treaty of 1818.

however, debar Newfoundland prohibiting her inhabitants from engaging themselves on American fishing vessels. That is very important from her standpoint. It does not affect Canada. Both sides claim a victory on the question, and possibly it may take another arbitration to decide it.

Questions Nos. 3 and 4.—These questions are comparatively of minor importance, and relate to the right of Great Britain to require American fishing vessels to make entry and report at customs, and to impose upon them customs, light, harbour and similar dues while exercising their liberties under the treaty.

Question No. 3 applied to treaty coasts and is mostly of interest to Newfoundland, as Canada exacts no light dues whatever, and has no customs house on the treaty coasts, except at the Magdalen Islands.

On Question No. 3 the tribunal decided and awarded:

> The requirement that an American fishing vessel should report, if proper conveniences for doing so are at hand, is not unreasonable, for the reasons stated in the foregoing opinion. There should be no such requirement, however, unless there be reasonably convenient opportunity afforded to report in person or by telegraph, either at a custom house or to a customs official.
>
> But the exercise of the fishing liberty by the inhabitants of the United States should not be subjected to the purely commercial formalities of report, entry and clearance at a custom house, nor to light, harbour or other dues not imposed upon Newfoundland fishermen.

Question No. 4 applied to non-treaty coasts, and asked whether American vessels entering the bays, harbours, etc., on the non-treaty coasts for the purpose of shelter, to make repairs, or to obtain wood or water, should be placed under restrictions making the exercise of these privileges conditional upon the payment of light or harbour dues, or entering at customs houses.

The tribunal decided and awarded that:

'Such restrictions are not permissible,' but modified this broad decision by declaring that it would be only reasonable for American fishermen entering colonial bays

and remaining therein for more than forty-eight hours, to be required to report either in person or by telegraph at customs, 'if reasonably convenient opportunity therefor is afforded.'

The award on these two questions is eminently fair, and entirely satisfactory to Canada and Newfoundland.

Question No. 6.—This question related to the ingenious contention of Sir Robert Bond, prime minister of Newfoundland, that Americans had no right to fish in the bays on the treaty coast of Newfoundland or of the Magdalen Islands, because the words 'bays, creeks and harbours' were omitted in describing the liberty there given them. He argued that these omissions were not accidental, but showed an intention of the framers of the treaty to restrain Americans from entering the bays, and to restrict them to the broad, open coasts. It was a strained construction, never advanced by Great Britain in prior diplomatic correspondence, and adopted by the Newfoundland government in 1905 as part of its retaliatory policy toward American fishermen. However, at the instance of Sir Robert Bond, it was submitted to the tribunal along with the others, but as expected it was rejected. It is entirely a question of interest to Newfoundland, and no one but Sir Robert Bond thought it would be allowed.

Question No. 7.—This, the last question submitted to the tribunal, related to the exercise of commercial privileges by American fishing vessels on the treaty coasts. Could American fishing vessels exercising the liberty of fishing on the allotted coasts at the same time engage in trade; *e.g.* purchase bait, supplies, lines, ice, etc.? Great Britain contended that this would result in violation of the revenue laws. The soundness of the arguments advanced on both sides led to a modified answer by the tribunal. It was:

> For these reasons the tribunal is of opinion that the inhabitants of the United States are so entitled in so far as concerns this Treaty, there being nothing in its provisions to disentitle them, *provided* the Treaty liberty of fishing and the commercial privileges are not exercised concurrently, and it is so decided and awarded.

In other words, assuming that American fishing vessels had been accorded commercial privileges by agreement or otherwise, and since there is nothing in the treaty to take them away, the tribunal decided that these fishing vessels may touch and trade, but they must not trade and fish during the same voyage or 'concurrently.' They may go to the treaty coast and fish but then they may not trade; or they may trade but then they may not fish. The answer to the question is very indefinite, but it is apprehended that it is in accordance with the British contention, although, as in the case of Question No. 2, it may take another arbitration to decide it. Both sides claim a victory on the point.

To sum up: Upon Question 1, the great question of the right to regulate, the answer of the tribunal effected something of a compromise. Great Britain scored a diplomatic victory. The question of abstract right was decided in her favour. But the tribunal gave full effect to the admission which Great Britain was forced to make, that her regulations must be reasonable, by instituting a commission of experts to pass upon those regulations. In that way the British contention was sustained, while at the same time American fishermen were protected from unfair and discriminatory legislation. Question 5, the important question of bays, was decided in accordance with the British contention. But it must be noted that no principle applicable to all bays was laid down. The opinion of the arbitrators (for in this particular Dr Drago agreed with the majority) was that a general rule for all bays does not exist in international law. After months of study, and no less than fifteen days of oral debate at The Hague, the arbitrators frankly admitted that to translate the popular meaning of the word 'bays' into a legal definition was beyond their powers. Questions 3 and 4, the questions relating to light and harbour dues and reporting at customs, resulted in a very fair compromise, entirely satisfactory to both parties. Question 6, the belated question raised by Sir Robert Bond, was decided in favour of the United States. Question 7, relating to commercial privileges, was

probably decided in Great Britain's favour, although the decision was indefinite. Question 2, relating to the employment of non-inhabitants by United States captains, also received an unsatisfactory answer, and the effect is uncertain.

In 1912 representatives of both powers met at Washington for the purpose of giving binding effect to those parts of the award of The Hague Tribunal of September 7, 1910, which were in the nature of recommendations only. On July 20 a treaty was passed and subsequently duly ratified, which carries out, with minor modifications, the rules and methods of procedure recommended by the arbitrators two years before.

The treaty provides that all future laws or rules for the regulation of the fisheries of Great Britain, Canada, or Newfoundland, such as relate to the time and method of taking fish, shall be promulgated and come into operation during the first fifteen days of November in each year. At ten-year intervals a change in the date may be made the subject of negotiation, and, if necessary, of submission to a commission.

After the promulgation the United States is given forty-five days in which to object. It is provided that the objection may be submitted to a permanent mixed fishery commission. This commission is to consist of three members appointed for five years, two of whom shall be experts, one from Great Britain and the other from the United States.

The recommendations of The Hague Tribunal regarding the determination of the limits of the bays enumerated in the award were adopted in so far as they related to the bays contiguous to the territory of the Dominion of Canada. It was expressly asserted that the two nations understood that the award did not cover Hudson Bay. It was further agreed that the delimitation of bays on the Newfoundland coast, whether mentioned in the recommendations or not, did not require present consideration.

While, therefore, two of the points in dispute remain in an unsatisfactory position, and may give rise to future trouble, the award of 1910 and supplementary treaty of

1912 as a whole must commend themselves, because they seem to provide a practical and permanent solution of most of the questions at issue. And it certainly would be a matter of general congratulation, and a potent argument in favour of international arbitration, if the award of The Hague Tribunal has successfully brought to a close a controversy which, in its various aspects, has been a constant source of vexatious dispute, and has menaced for upwards of a century the peaceful relations existing between the United States and Great Britain.

II

THE BERING SEA FUR-SEAL DISPUTES

BY virtue of the discoveries of Vitus Bering, a Danish navigator in the Russian service, Russia, early in the eighteenth century, acquired possession of a portion of the north-west coast of North America. This region, afterwards called Alaska, was ceded by Russia to the United States in 1867 for the sum of $7,200,000. In 1870 the Seal Islands in Bering Sea, called the Pribyloff group, were leased by the United States government to a private company, the Alaska Commercial Company, with the privilege of taking one hundred thousand fur-seals annually. In consideration of this privilege, which was granted for twenty years from May 1870, the company agreed to pay the annual sum of $55,000, a tax of two dollars on each fur-seal taken, a duty of fifty-five cents on each gallon of oil obtained from the seals, and to maintain a school on the islands.

Very soon it became apparent that the seal herd was exposed to serious diminution by means of pelagic or open-sea hunting. As early as 1872 a suggestion had been made by the United States collector of customs at San Francisco to the secretary of the Treasury, that a revenue cutter should be sent to the Pribyloff Islands with a view to prevent such destructive hunting. This was not done.

In the summer of 1886 the *Carolina*, *Thornton* and *Onward*, three Canadian sealing vessels, were seized by the United

States cruiser *Corwin* at points in Bering Sea over seventy miles from land, for alleged violation of an act of Congress which forbade the taking of fur-seals in Alaskan waters. Sir Lionel Sackville-West, British minister at Washington, at once protested that the seizures were illegal, because they had been made in the open sea and at a greater distance from land than three miles, and therefore outside the territorial jurisdiction of the United States. A prolonged diplomatic controversy ensued. Neither country would yield to the contention of the other. In August 1887 Thomas F. Bayard, the United States secretary of state, without discussing the grounds upon which the seizures had been made, proposed that the various nations interested should unite in an international arrangement for the protection of the seals from extermination. Although the prospect of an agreement being signed appeared for a time promising, the plan ultimately failed because of the refusal of Great Britain to proceed with it against the remonstrance of Canada.

No seizures took place in 1888, but in 1889 six Canadian sealing vessels were seized, and the United States secretary of state, James G. Blaine, asserted the right of the United States to protect the seals on the twofold ground of that government having succeeded by the treaty of cession of 1867 to certain alleged rights of Russia in Bering Sea, and of the urgent necessity of such measures in order to preserve the seal herd from being destroyed by open-sea or pelagic hunting. The whole controversy was renewed, and the views exchanged between the two governments were in such hopeless disagreement that it soon became evident that no satisfactory solution of the difficulty could be reached through diplomatic channels. It was then proposed by Lord Salisbury, on behalf of Great Britain, that the questions in dispute between the two countries relating to the regulation and ownership of the Alaskan seal fisheries should be referred to impartial arbitration. This was agreed to by the United States.

Effect was given to the proposal by the treaty of February 29, 1892, which provided for the creation of a Board of Arbitration composed of seven members, two to be named

by the president of the United States, two by the queen of England, and one each by the president of France, the king of Italy and the king of Sweden. The arbitrators were required to be 'jurists of distinguished reputation in their respective countries,' and if possible 'acquainted with the English language.'

By Article 6 of this treaty the arbitrators had referred to them, in the first place, certain points bearing on the question whether the United States had acquired from Russia, upon the purchase of Alaska in 1867, any extraordinary jurisdictional powers in Bering Sea; in the second place, whether the United States had any right of property or protection in the fur-seals when found outside the ordinary three-mile limit.

Assuming that these legal questions should be so decided as to deprive the United States of the right to make necessary regulations for the protection of the seal fisheries without the concurrence of Great Britain, then, by Article 7 of the treaty, it was agreed that the arbitrators should themselves determine what concurrent regulations outside the jurisdictional limits of the respective governments were necessary and over what waters they should extend. Two commissioners on the part of each government were appointed to investigate all the facts relating to seal life in Bering Sea, and their separate reports and their joint report upon the points on which they were able to agree were to be laid before the arbitrators along with such other evidence as either government might submit.

The other class of questions had reference to damages claimed by Great Britain for the seizures of the vessels above referred to. This liability, however, was left as a subject for future negotiation, and only questions of fact involved in such claims were to be submitted to the arbitrators and a finding asked upon them. A *modus vivendi* was arranged and was to remain in force until the award of the tribunal was rendered.

The tribunal assembled at Paris on March 23, 1893. As American arbitrators the president of the United States named John M. Harlan, a justice of the Supreme Court of

the United States, and John T. Morgan, a senator of the United States. On the part of Great Britain the arbitrators named were Lord Hannen of the High Court of Appeal, and Sir John Thompson, minister of Justice for Canada. As neutral arbitrators the president of France named Baron Alphonse de Courcel, a senator and ambassador of France; the king of Italy named Marquis Venosta, formerly minister of Foreign Affairs; and the king of Sweden named M. Gregors Gram, a minister of State. Baron de Courcel was chosen president of the tribunal.

Five questions, covering all the points in dispute between the two powers, were submitted to this high tribunal. The first four were:

> 1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior to and up to the time of the cession of Alaska to the United States?
>
> 2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?
>
> 3. Was the body of water now known as the Behring's Sea included in the phrase 'Pacific Ocean' as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after the said Treaty?
>
> 4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th March 1867, pass unimpaired to the United States under that Treaty?

These four questions relate to the exclusive right in the seal fisheries in Bering Sea claimed by the United States and may be dealt with conveniently together.

Now considering that, in the absence of treaty or some claim based on acquiescence, the right of exclusive fishing on the high sea conceded to any country by international law is limited to a marginal belt along the coast three miles in width, and that the seizures of the Canadian sealers had been effected at points from 70 to 115 miles distant from land,

the heavy burden fell upon the United States to prove, in the face of these general principles of international law, that Russia by the express consent or acquiescence of other nations had effectively asserted jurisdiction over the fur-seals swimming about in the open waters of Bering Sea. For it is obvious that if Russia did not exercise jurisdiction in Bering Sea or have an exclusive right to the 'seal fisheries' there, she could not cede it to the United States in 1867.

The historical background to this part of the case is not extensive. Vitus Bering in 1728 and 1741 explored the mainland and neighbouring islands of what is now Alaska. The claims of Russia to this country were contested by Spain and Great Britain, but were partly settled by the Nootka Sound Convention of 1790. In 1799, by an imperial ukase or edict, Paul I, the emperor of Russia, granted to the Russian-American Company certain exclusive commercial privileges in Alaska and the adjacent islands. The ukase was purely territorial; it did not claim jurisdiction over the sea, or profess to affect foreigners.

In 1821 Alexander, the emperor of Russia, issued a ukase, by which he gave his sanction to certain regulations adopted by the Russian-American Company respecting foreign commerce in the waters bordering on its establishments. By these regulations the pursuits of commerce, whaling and fishing and every other industry on the north-west coast of America and the adjacent islands from Bering Strait down to the 51st parallel of north latitude, were 'exclusively granted to Russian subjects,' and all foreign vessels were forbidden, except in case of distress, 'not only to land in the coast and islands belonging to Russia, as stated above, but also to approach them within less than 100 Italian miles.' A printed copy of the ukase and of the regulations was sent by Russia to the United States and Great Britain. John Quincy Adams, then secretary of state of the United States, entered an immediate and vigorous protest against every part of the Russian claim. He stated that 'the attempt to exclude American citizens from the shore, beyond the ordinary distance to which the territorial jurisdiction extends, has excited the greatest surprise.' In a word, the United States

in 1822 protested in the most emphatic manner against the assertion by Russia of certain exceptional jurisdictional rights, although the United States afterwards claimed that these same rights had been ceded to her by Russia at the purchase of Alaska in 1867.

Great Britain, as well as the United States, protested against the ukase of 1821, and the result was that Russia entered into negotiations with both powers for treaties which would settle all points in dispute and mark out with precision the boundaries of Russian territory in America.

In 1824, therefore, the United States and Russia entered into a treaty, by the first article of which it was agreed 'that, in any part of the Great Ocean commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the high contracting powers shall neither be disturbed or restrained either in navigation or fishing, or in power of resorting to the coasts which are unoccupied,' etc. Various stipulations followed, the sum and substance of which was that there should be no interference with navigation or fishing, or with resort to unoccupied coasts in any part of the Pacific Ocean, and that the dividing line between the territorial claims or 'spheres of influence' of the United States and Russia on the north-west coast of America should be the parallel of 54° 40′ north latitude.

In 1825 the dispute between Great Britain and Russia, growing out of the ukase of 1821, was settled by treaty. In respect of territorial claims a line of demarcation was adopted, afterwards definitely determined by the Alaska Boundary Award of 1903. In regard to the rights of navigation and fishing and of landing on the coasts, its provisions were substantially the same as those of the convention of 1824 between Russia and the United States. In both these treaties, in fact, Russia, owing to the protest of Great Britain and the United States, withdrew and abandoned the claims of exceptional authority over waters one hundred Italian miles from land, which she had asserted in the ukase of 1821. The term used in the treaties was 'in any part of the Pacific Ocean or South Sea,' and when the controversy broke out between Lord Salisbury and James G. Blaine, United States

secretary of state, in 1886, the question at once arose, Did 'Pacific Ocean' include Bering Sea? Did Russia renounce her pretensions merely in the 'Pacific Ocean' (south of 60° north latitude) along the 'North-Western coast,' as the United States claimed, or did the phrase 'Pacific Ocean' include Bering Sea as claimed by Great Britain.

In 1867, by a convention signed at Washington, the emperor of Russia, in consideration of the sum of $7,200,000 in gold, ceded 'all the territory and dominion' which he possessed 'on the continent of America and in the adjacent islands' to the United States. It is to be observed that the western boundary of the territory ceded (as shown on the map) is defined by a water line beginning in Bering Straits and running almost south-west, through Bering Straits and Bering Sea to a point where it intersects the meridian of 163° west longitude. Great Britain early in the controversy took the position that the treaty did not purport to convey the waters of Bering Sea, but in terms conveyed only 'the territory and dominion' of Russia 'on the continent and adjacent islands,' and drew a water boundary so as to effect a transfer of the islands, many of them nameless, which lay in the intervening seas. The United States, on the other hand, originally justified the seizures of Canadian sealers one hundred and fifteen miles from land, on the ground that the waters of Bering Sea within this boundary-line were part of the territory of Alaska.

In 1886 occurred the seizures of Canadian vessels, finally followed by the arbitration at Paris in 1893. The arguments of the parties on the first four questions may be briefly summarized thus:

Question 1.—The United States contended that while Russia never at any time prior to the cession of Alaska to the United States claimed any exclusive jurisdiction in the sea now known as Bering Sea, beyond what was commonly termed territorial waters, yet she did, at all times since the year 1821, assert and enforce an exclusive right in the 'seal fisheries' in the said sea, and also asserted and enforced the right to protect her industries in the said 'fisheries' and other industries, by establishing prohibitive regulations interdicting

all foreign vessels, except in certain specified instances, from approaching these islands and shores nearer than one hundred miles.

Great Britain contended that Russia had exercised no exclusive jurisdiction in Bering Sea prior to 1867; that in 1821 only Russia had asserted exclusive jurisdiction over a part of Bering Sea, but that she afterwards withdrew it; that Russia had never exercised rights in the 'seal fisheries' prior to 1867; that her claim to jurisdiction extending one hundred miles from the coast had been withdrawn and never afterwards asserted.

Question 2.—The United States contended that the claims of Russia above mentioned as to the 'seal fisheries' in Bering Sea were at all times, from the first assertion thereof down to the time of the cession to the United States, recognized and acquiesced in by Great Britain.

Great Britain contended that she had neither recognized nor conceded any claims of Russia to jurisdiction as to the seal fisheries, *i.e.* either to exclusive jurisdiction in Bering Sea or exclusive rights in the fisheries in Bering Sea.

Question 3.—The United States contended that the body of water now known as Bering Sea was not included in the phrase 'Pacific Ocean' as used in the treaty of 1825 between Great Britain and Russia; that Russia had never relinquished her exceptional authority in Bering Sea, but had continued to exercise exclusively a property right in the fur-seals resorting to the Pribyloff Islands, and had established a further right of protecting the seals by the exercise of necessary and reasonable force over Bering Sea.

Great Britain contended that Bering Sea was included in 'Pacific Ocean' in the treaty of 1825, and that Russia had no rights in Bering Sea save only such territorial rights as were allowed her by international law.

Question 4.—The United States contended that all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea east of the water boundary in the treaty of cession of 1867 passed unimpaired to the United States under that treaty.

Great Britain contended that no rights as to jurisdiction

or as to the seal fisheries east of the water boundary passed to the United States under the treaty of 1867, except such as were incidental to the islands and other territory ceded.

It must here be noted that there were several legal and historical antecedents which worked against the absolute consistency and distinctness of the grounds upon which the United States based their claims on this branch of the case, and which indeed were fatal to success.

The *first* is: That the original ground upon which the vessels seized in 1886 and 1887 were condemned, was that Bering Sea was a *mare clausum* or 'closed sea,' and as such had been conveyed, in part, by Russia to the United States. Judge Dawson, who presided in the Federal court at Sitka at the trial of the *Thornton*, the Canadian sealer seized seventy miles distant from land, held that 'all the waters within the boundary set forth in the treaty . . . are to be considered as comprised within the waters of Alaska.' The same judge, in the case of the *Dolphin*, justified the seizure on the ground that the United States had purchased the sea east of the boundary-line, and that the action of the United States was a 'legitimate exercise of the powers of sovereignty under the law of Nations.'

This contention, put forth by the United States in the first stages of the controversy—that Bering Sea was a *mare clausum* or 'shut sea'—was early found to be so untenable that her counsel hastened to abandon it.

James G. Blaine later renounced it. He said:

> The repeated assertions that the Government of the United States demands that the Behring Sea be pronounced *mare clausum*, are without foundation. The Government has never claimed it and never desired it. It expressly disavows it. . . . Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case.

F. C. Carter, senior counsel for the United States at the arbitration, also thought it necessary to disavow the claim of *mare clausum*, and in his oral argument used somewhat contemptuous expressions in referring to the courts at

Sitka, and denied that they represented the real views of the treaty held by the United States.

The *second* is : That the ukase of 1821 which contained the only distinctive claim of *mare clausum* ever put forward by Russia, did not assume to treat the whole of Bering Sea as a closed sea, but only to exclude foreign vessels from coming within one hundred Italian miles, from the 51st parallel of north latitude to Bering Straits without discrimination as to localities.

That against this ukase both the United States and Great Britain protested ; and that by the treaties of 1824 and 1825 Russia agreed not to interfere with their citizens or subjects either in navigating or in fishing in ' any part ' of the Pacific Ocean, thus abandoning the exclusive jurisdictional claims announced on the ukase.

The *third* is : The declaration of James G. Blaine, secretary of state of the United States, on December 17, 1890. After observing that legal and diplomatic questions, apparently complicated, were often found after prolonged discussion to depend upon the settlement of a single point, Blaine stated that such was the position of Great Britain and the United States in respect of the phrase ' Pacific Ocean.' Great Britain contended that that phrase, as used in the treaties of 1824 and 1825, included Bering Sea ; the United States contended that it did not. If Great Britain could maintain her position on this point, declared Blaine, the government of the United States had ' no well-grounded complaint against her.' And it was afterwards unanimously found by the arbitrators that the phrase ' Pacific Ocean ' did include Bering Sea.

The *fourth* is : That it was not until the sensational discovery had been made, upon the presentation of the printed case of the United States, that an astounding series of false translations had been made by Petroff, the translator of documents in the Russian archives, and handed over to the United States at the cession, that the broad claim of exceptional jurisdiction over Bering Sea was dropped by the United States and the ' exclusive right to the seal fisheries ' was relied on. It appears that Petroff, with a view to ingratiate himself with the government of the United States

and impress upon it the importance of the Russian archives, had by elaborate mistranslations and interpolations grossly imposed upon that government. When John W. Foster, agent for the United States, discovered the fraud, he at once withdrew the documents in their entirety, substituting revised translations.

Sir Charles Russell, senior counsel for Great Britain, says on this point:

> Petroff was an acute and accomplished artist. He had realized the position completely and had built up the documents by means of interpolations exactly fitted to the case of dominion and exclusive jurisdiction. When the United States had discovered the fraud and had withdrawn the forgeries and had substituted amended and corrected translations, their whole case of exclusive jurisdiction of Russia vanished.

The effect of the false translations, their detection and withdrawal, was to remove practically the only evidence from distinctively Russian sources, apart from the ukase of 1821, of the assertion by Russia of any exceptional jurisdiction in Bering Sea. Foster, who represented the United States government in all matters connected with the arbitration, said: 'It is a singular incident that when the case of the United States came to be prepared and the Russian archives examined, what had been assumed in the legal proceedings to be historical facts, could scarcely be substantiated by a single official document.' He also admitted: 'Had our effort to save the seals from destruction been from the outset based upon a right of protection and property in them, our case before the Tribunal would have been much stronger and the decision might have been different.'

The *fifth* question submitted to the tribunal was:

> Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?

It is noteworthy that the point involved in this question —the right of *protection* or *property* in the fur-seals, which in

the judgment of American counsel became the leading, if not the only ground of defence of the seizures—was not advanced in the legal proceedings of 1886, and was not mooted until a late stage of Blaine's controversy with Lord Salisbury. It was an afterthought, the product of the mind of Benjamin F. Tracy, United States secretary of the Navy. When the claims of 'exclusive jurisdiction' and 'exclusive right to the seals' failed, it was advanced in a kind of despair—a sort of 'desperation argument.'

This constant shifting of base in the American argument was adverted to throughout the proceedings with keen satisfaction by British counsel. Comment on this point in the British argument, in part, is :

> Seldom, if ever, has such a claim been based upon such varying contentions.
>
> Seldom have the arguments supporting a claim of right been shifted so lightly from one standpoint to another.
>
> Now it is asserted as a claim of old descent from Russia; then, when it is shown that Russia neither had nor claimed to have a right at all commensurate, it becomes a claim by the United States in their own right of dominion.
>
> At one time it is a claim to a vast area of Behring Sea as territorial waters; but, when the limitation of territorial waters assented to by all nations is insisted on, it becomes reduced to a claim of jurisdiction on the high sea—a claim based upon a false analogy.
>
> Fur-seals are undeniably *ferae naturae*, yet a claim to property therein, with all its attendant rights, is asserted, and they are gravely relegated to the same category as a herd of cattle on the plains. Then, when the impossibility of establishing property in free-swimming animals in the ocean is demonstrated, the pretension resolves itself into a general and undefined claim to protect the seals in the Pacific.
>
> Finally, a vague appeal is made to the principles of the common and the civil law, to the practice of nations, the laws of natural history, and the common interests of mankind ; but one looks in vain for any vindication of the unprecedented pretensions put forward upon any such principles.

Two distinct points are involved in Question 5.

The *first* is: Whether the United States have a property interest in the seals themselves, not only while they are upon the breeding islands, but also while they are on the high seas. The *second* is: Whether, if they have not a clear property in the seals themselves, they have a right to extend their protection to such herd against capture while it is on the high seas, and to require and receive from other nations an acquiescence in reasonable regulations designed to afford such protection. The United States advanced both these claims for the same purpose, and, either being allowed, would exercise the right by prohibiting absolutely pelagic sealing and confine the taking of seals to the Pribyloff Islands by the lessees of the United States.

The 'property argument' will first be dealt with.

In support of the claim to ownership in the seal herd, it was urged by the United States that seals in international law were analogous to such animals as bees, wild geese, swans and pigeons (especially homing-pigeons), which, at the common law, as Blackstone said, continued to be the property of their custodian when flying at a great distance from home, because of their having a fixed intention to return—the *animus revertendi*. It was acknowledged that animals *ferae naturae*—animals of a wild nature—were not capable of ownership until reduced to possession; but it was contended that the term *ferae naturae* was not sufficiently precise for a legal classification of animals in respect of the right of property in them, and that the determination of the question whether an animal was of a wild nature or not depended in each case upon the characteristics of the particular animal. There was no principle of jurisprudence, it was urged, to the effect that *no* wild animals were the subject of property. Elaborate citations from the Roman law and common law of England were advanced in proof of the proposition. F. C. Carter, who had charge of this branch of the American argument, stated that the essential facts which, according to these doctrines, render animals commonly designated *wild*, the subjects of property, not only while in the actual custody of their masters, but also when temporarily absent therefrom, were 'that the care and

industry of man acting upon a natural disposition of the animals to return to a place of wonted resort secures their voluntary and habitual return to his custody and power, so as to enable him to deal with them in a similar manner and to obtain from them similar benefits as in the case of domestic animals.'

It was contended that the Alaskan fur-seals were a typical instance for the application of this doctrine. By their imperious and unchangeable instincts they are impelled to return from their wanderings to their original habitat; they are defenceless against man, and, in returning periodically to the same place, voluntarily subject themselves to his power, and enable him to treat them in the same way and to obtain from them the same benefits as may be had in the case of domestic animals. They thus become the subjects of ordinary husbandry as much as cattle or sheep. The selections for the slaughter are easily made. They are compelled to breed upon the land and are confined to that element for half the year. During the entire periods of absence, even when swimming thousands of miles away along the coast of Southern California during the winter months in search of food, the *animus revertendi*—this fixed habit of returning—is ever present.

Under the circumstances, asked the United States, could anything be clearer as a moral, and under natural laws a legal, obligation than the duty of other nations to refrain from taking any action which would prevent the United States, the owner of the lands to which the seals resort, from performing the trust which it acknowledged and had discharged? To say that the United States had no *power* to prevent sealing on the high seas was to beg the question. If they had a property right in the seals, the power to protect it could not be wanting.

If it were asked whether the United States asserted a legal right of property on any individual seal that might be found in the sea, on which an action for trespass might be maintained in a municipal tribunal to recover damages from the slayer, or to recover the skin of the animal, if it should anywhere be found, the answer was that the United States did not insist upon this extreme point because it was not necessary for the

consistency of its argument to go so far. Summing up this branch of the case Carter said :

> All that is needed for the United States purpose is that their *property interest* in the *herds* should be so far recognized as to justify a prohibition by them of any *destructive pursuit* of the animal calculated to injure the industry prosecuted by them on the Islands. The conception of a *property interest* in the *herd* as distinct from a *particular title to every seal* composing the herd, is clear and intelligible.

This branch of the American argument involved of necessity an elaborate examination into the life-history of the fur-seal. It is practically a chapter in natural history. Into the particulars relating to the general nature and characteristics of the fur-seal, the physiology, the instincts, the habitats, the life on the rookeries on the Pribyloff Islands, the migration, differences of form, mode of reproduction, the nursing of the young seals or 'pups,' the immorality and destructiveness of pelagic sealing and numerous other considerations relating to seal life, space will not permit us to enter. Upon nearly all the important points there was the sharpest conflict between the parties, both as to facts and the inferences to be drawn from them. Each traversed the facts and theories of the other.

The British argument maintained that fur-seals were animals *ferae naturae*, and in support of this contention recited : that 'the fur-seal is not only a marine animal, but pelagic in habit, spending most of its time at large on the open sea'; that 'its food is entirely derived from the ocean'; that such an animal cannot be said to have a 'home'; that they have none of the characteristics of a land animal. 'All ideas attached to the word "domestic" are,' said the British argument, 'therefore wanting in the case of fur-seals.' 'No scientific authority can be adduced in support of the contention that the seal is other than a wild animal.' The common law in force in both America and England 'recognized no property in animals *ferae naturae* until possession.' Property while the animals are alive remains only as long as this possession lasts; when this possession is lost the property is

lost. The fur-seals are wild animals at large, and Great Britain has as much right to reduce them to possession as the United States. 'At various stages in the world's history, nations had,' said Sir Charles Russell, according to their varying powers advanced 'extravagant pretensions.' But these pretensions, generally speaking, belonged to a comparatively remote period, when the rule of might rather than the rule of right prevailed, and before the moral force of public opinion had acquired its great controlling power. Assertions had been made of control, dominion, and sovereignty over a large extent of ocean without physical boundary and without any external marks of delimitation, and there resulted from those assertions a claim to exclude others from the given area and to deal exclusively with whatever was found in it. But this was a very different thing from an assertion of property in the particular animals which might inhabit the area. And declared Sir Charles, 'this is the first time in the history of the world that a nation or an individual has ever claimed property in a free-swimming animal in the ocean.'

In reply to the argument that the fur-seals are as much a subject of ordinary husbandry as cattle or sheep, Sir Charles's answer in part was :

> Now, it is said that these animals resort to the islands to breed and resort there in compliance with what has been picturesquely described as the 'imperious instincts of their nature.' They do.
>
> And when they get there what do the representatives of the United States do ? Can they do anything to improve the breed ? Nothing. Do they make any selection of sire and dam : of bull and cow ? Indeed could they ? No. What do they do ? They do two things, one positive and the other negative, and two things only. The positive thing is that they do what a preserver-game [*sic*] does ; he has a game-keeper to prevent poaching ; they have people on the islands to prevent raiding. The negative thing they do is that they do not kill all. They knock on the head a certain number, but exercise a certain amount of discrimination or a large amount of discrimination. That is the whole

> sum and substance of what they do, no more, no less . . . the only thing that nature does not do is that she does not knock them on the head.

The contention of the United States that the seal herd was as much a subject of domestication as sheep or cattle on the plains was challenged by Russell. There was but one instance given in the case of the United States, he said, in which an attempt was made to tame a young seal—the case of the pup called 'Jimmie.' His mother gave birth to him away from the rookeries while on her way from the killing-grounds to the water, and he was taken in charge by an employee of the sealing company with a view to saving his life and making a pet of him. As stated by the witness, the pup could not be made to eat, and generally bit those who attempted to feed him. Spoons and nursing bottles were tried in vain; and after two weeks or more of futile effort, a flexible tube was put down his throat, and by means of a syringe a pint of fresh cow's milk was injected into his stomach. After the operation he showed 'in the most unmistakable manner the greatest of seal delight' by lying on his back and side bleating and fanning and scratching himself. The next morning he was dead. A single fact, continued Sir Charles, rendered the complete domestication of the seals impossible, and that was that if you attempted to keep them under control and on land they would inevitably die. To use the words of the United States case, by 'the imperious necessity of their nature' they must go to sea. Was it gravely to be said that seals were tame animals? Had the United States ever professed to tame them? Had they alleged, and could they truly allege, anything more than that, by reason of the incapacity of the animal to defend himself on land, he could be easily killed with a club? Taking the facts which were not in dispute concerning the seal, who could doubt that it was anything but *ferae naturae*—an animal in the state of nature?

As to the 'protection argument' of the United States, the American case had thus far proceeded on the ground of a national property in the seal herd itself. But admitting

for the sake of argument that no such right of property existed, and that the seals outside of territorial waters were animals *ferae naturae*, let them be likened, if that be possible, to the fish whose birthplace and home are in the open sea, and which only approach the shores for the purpose of food at certain seasons. The question remained, Had not the United States government, for itself and for its people, an interest, an industry and a commerce in the seal herd in its territory, which it is entitled, upon all principles applicable to the case, to protect against wanton destruction by individuals for the sake of the small and casual profits in that way gained? Assuming, said the United States, that it had no property interest in the seal herd outside the limits of its jurisdiction, there was still the question, whether upon that hypothesis the industry established and maintained by its government on the Pribyloff Islands, in the taking of seals and the commerce that is based upon it, are open to be destroyed at the pleasure of citizens of Canada by a method of pursuit outside the ordinary lines of territorial jurisdiction, which must result in the extermination of the animals. Was there, even in that view of the case, any principle of international law which deprives the United States government of the right to defend itself against this destruction of its unquestioned interests, planted and established on its own territory? In other words, is the right of individual citizens of another country to the temporary profit to be derived out of such extermination, superior, on the high sea, to that of the United States government to protect itself against the consequences? Was any part of the high sea open to individuals for the purpose of accomplishing the destruction of national interests of such a character and importance? The United States conceded the general rule of the freedom of the ocean, but asserted that the sea is free only for innocent and inoffensive use, not injurious to the just interests of any nation which borders upon it.

Further, it was contended that the United States, possessing, as they alone possessed, the power of preserving and cherishing this valuable interest, were in a most just sense

the trustee thereof for the benefit of mankind, and should be permitted to discharge their trust without hindrance.

The United States admitted that no precise precedent existed for the support of this novel contention; but its claim to protect the seals outside territorial waters, it was urged, could be justified by reference to the uniform practice of nations. An elaborate examination was then made of the measures taken for the protection of other seal herds, including those of the Falkland Islands, New Zealand, Cape of Good Hope, Newfoundland and Greenland. Great Britain had found it necessary to protect from extermination the hair-seal in the North Atlantic, and other nations had adopted similar measures. Reference was also made to the protection by Great Britain of the Irish oyster fisheries, the Scotch herring fisheries, the pearl fisheries of Ceylon and Australia; to the regulation by France of the coral fisheries of Algiers, which extend out at some points seven miles into the sea; to the protection by Italy of coral beds distant from three to fifteen miles from the coast; to the protection by Norway of whales in the Varanger Fjord, an arm of the sea about thirty-two miles wide; and to the control by Mexico of pearl fisheries off the coast of Lower California to a distance of more than three miles from land.

In support of this contention the United States fell back upon the Law of Nations. This claim to protect the seals in Bering Sea, it was argued, presented 'nothing new, except the particular circumstances of the application of a universal and necessary principle to an exigency that has not arisen in this precise form before.' But, urged American counsel, the advance of the Law of Nations must be by the process of analogy, in the application of fundamental principles to new cases as they arise. Even if it were admitted that a precedent were not to be found, this was simply because the same right was never before invaded in the same way. The particular precedent is created when the necessity for it appears. The absence of it, when the necessity has never arisen, proves nothing. And if it were possible to regard the present case as in any respect outside the rules previously established, its determination 'would then be remitted to

those broader considerations of moral right and justice which constitute the foundation of international law.'

Great Britain on the other hand contended that an abstract right of protection (such as was here claimed), distinct from a right of property in the animal sought to be protected, could not exist. It would involve the right to make the protection respected, and therefore an interference with the equality and independence of other nations upon the high seas; and interference which would take the concrete form of a right of visit and search. The exclusive right to take possession of animals on land 'does not carry with it a right to protect such animals when they leave the land.' In a word, said Great Britain, 'the right to protect depends on the existence of property.'

Great Britain denied that the principles of the Law of Nations applied to the case:

> Shorn of all support of international law, and of justification from the usage of nations, the claim of the United States to possess and to protect the seals in the high sea takes, at last, its final form—a claim of property.
>
> Yet not wholly is it rested on property. The greatest jurists of the world have dealt with 'property' and 'possession' in such fashion, have defined their meanings with such precision of thought and language that it is not surprising the United States should shrink from the hopeless task of attempting to formulate a new species of ownership. And so, at last, driven from all the standpoints of admitted and long-known rights, the argument of the United States takes refuge in a claim for protection where there is no property, under circumstances so novel that its supporters confess with candour that it can be rested on no precedent, but that a precedent ought to be established by international law to meet the exigencies of the case.
>
> To all this shadowy claim the Government of the Queen submit but one answer—the law. . . . The whole case, and every part of it, and every form in which ingenuity can frame it, is covered by the law. And to this law Her Majesty's Government most confidently appeal.

Great Britain impugned the motives of the United States for desiring to protect the seal herd. Why did the United

States delegate to itself the office of trustee of the seal herd for the benefit of mankind? The United States contend, said Sir Charles Russell, in effect this:

> We, the United States, are not making this claim from any selfish motives. We are here as friends of humanity. We acknowledge that this is not our property absolutely. We are trustees for the world at large. . . . We only ask to be permitted in the interests of mankind, for the benefit of mankind, to perform the office of trustees, as friends of humanity, as philanthropists, as champion of the interests of the world. . . . They say: 'Give us, the tenants and owners of these islands, the power to exclude everybody but ourselves from the great expanse of ocean in which those islands are situate. Put an end to pelagic sealing. . . . Authorize us by your award to search, and if necessary to seize and confiscate vessels that are engaged in this inhuman, this immoral traffic, and having given us that authority we will recognize our duty as trustees to mankind by giving to mankind the benefit of the fur-seal at the market price.

The chances of success on the part of the United States on the property and protection branch of their case were diminished by the following considerations:

1. It was admitted by American counsel that no municipal law of the United States had treated the species, individually or collectively, as the subject of property and protection on the high seas.

2. It was admitted by the United States that, for the claim of property and protection on the high seas, there was no precise precedent in international law, though it was strongly maintained that the claim was justified by analogies. But the tribunal considered that these questions should be decided upon the existing state of the law, and, finding no precedent in international law, they did not feel warranted in creating one.

3. The effort to support this claim was embarrassed by its relation to the subject of visitation and search on the high seas.

It will have been observed, that if the determination of the above five questions should leave the subject in such a position that the concurrence of Great Britain was necessary

to the establishment of regulations for the proper protection and preservation of the fur-seal in Bering Sea, then it was agreed by the treaty that the arbitrators themselves should determine what concurrent regulations were necessary.

On this subject, to all the schemes proposed by the British commissioners, the United States had one answer—that they were not suited to their purpose, and that the only true and effective remedy consisted in absolute prohibition of pelagic sealing. The arguments of both parties on this point are founded on the same divergence of views as to the facts and inferences. The chief features briefly are: That while the United States traced the destruction of seal life to pelagic sealing, involving the slaughter of pregnant females and the death of pups, born and unborn, Great Britain contended that the killing on the Pribyloff Islands had been excessive in respect of males, so that there was a deficiency for the purposes of impregnation, the harems having become too large; that the 'driving' had been so recklessly and cruelly done on the islands that the reproductive powers of the males not killed were destroyed; that any regulations relating to pelagic sealing would be useless unless they applied equally to the management of the islands themselves.

Great Britain denied the legal right of the United States to impose regulations without her concurrence, but when the question was put on the lower and practical plane of common benefit to all the nations interested, then she stated her willingness to co-operate cordially in giving effect to such measures as might be found necessary for the preservation of the fur-seals. So far as pelagic sealing was concerned, this object would be attained by the establishment of a protective zone around the Pribyloff Islands.

The sittings of the tribunal had commenced on February 23, 1893, and on August 15 of that year it rendered its decision. On the five questions of right submitted to the tribunal, its decision was against the United States. Every disputed point of law submitted by the treaty to the tribunal was decided in favour of Great Britain.

As to the *first*, the tribunal (Senator Morgan dissenting) decided and determined:

By the Ukase of 1821, Russia claimed jurisdiction in the sea now known as the Behring Sea, to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction on Behring Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limits of territorial waters.

As to the *second*, the tribunal (Senator Morgan dissenting) decided and determined:

That Great Britain did not recognize or concede any claim, upon the part of Russia, to exclusive jurisdiction as to the seal fisheries in Behring Sea, outside the ordinary territorial waters.

As to the *third*, the tribunal unanimously decided and determined:

That the body of water now known as the Behring Sea was included in the phrase 'Pacific Ocean' as used in the said treaty.

As to the *fourth*, the tribunal unanimously decided and determined:

That all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary, in the treaty between the United States and Russia of 1867, did pass unimpaired to the United States under the said Treaty.

As to the *fifth*, the tribunal (Senator Morgan and Justice Harlan dissenting) decided and determined:

That the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit.

The decisions on questions of law being against the United States, and the subject left in such a position that the concurrence of Great Britain was necessary to the establishment of

regulations outside territorial waters, the tribunal, in accordance with the treaty (Sir John Thompson, Senator Morgan and Justice Harlan dissenting), prescribed certain regulations, the important features of which are three, and comprise :

1. Prohibition at all times of pelagic sealing within a zone of sixty miles around the Pribyloff Islands.

2. The establishment of a close season for fur-seals during the months of May, June and July, within which sealing is prohibited over the whole of Bering Sea and that part of the Pacific Ocean lying north of the 35th parallel of north latitude and east of certain defined boundaries.

3. The prohibition of the use of nets, firearms and explosives in taking seals.

It may fairly be said, then, that the arbitration resulted in a victory for Great Britain. On all questions of right the decision was against the United States. This was not due to any lack of ability or effort on the part of American counsel. The views of the United States were urged with great persistency and force, and, at the end of weeks of discussion on both sides, its position remained unshaken. But the American contention was so novel, and in such open conflict with the accepted doctrine of the freedom of the seas, that the decision of the tribunal, on the first four questions at least, was not unexpected.

Attempt has been made to attenuate the American defeat by the assertion that while Great Britain won on the law, the United States won on the facts. There is small measure of truth in the claim. The desire of both Great Britain and the United States, and the main object of the Treaty of Arbitration, was the preservation of the seals from extermination. While Great Britain denied the claim of the United States to the ownership of the seals and the legal right to impose regulations without her concurrence, she expressed her willingness to abide by any regulations which the tribunal should deem necessary for their preservation.

The regulations finally framed and promulgated by the arbitrators (the Canadian arbitrator, Sir John Thompson, and the American arbitrators, Justice Harlan and Senator Morgan, dissenting) were the result of long and anxious consideration. While they lean in the direction of abolition of pelagic sealing, the establishment of a sixty-mile protected

zone about the Pribyloff Islands is far less than a total prohibition of pelagic sealing; and the maintenance of a circle of protected waters and the establishment of a close season was advocated by Great Britain herself in the report of her commissioners, and in her counter-case and argument. This is something infinitely less than a declaration that the right of property and protection of the entire seal herd was vested in the United States. Finally, when in 1911 Great Britain agreed to abandon pelagic sealing for a limited number of years, it was only on condition that she be paid $200,000 and a percentage of the catch of other nations.

In 1894 Great Britain agreed to accept the sum of $425,000 as damages growing out of the seizures in connection with the controversy.

The American agitation against pelagic sealing continued; and finally, in 1896, a joint high commission representing Canada and the United States was appointed to investigate the conditions of seal life in Bering Sea. In 1898 the commission met at Washington, but so far as the regulation of pelagic sealing was concerned nothing resulted.

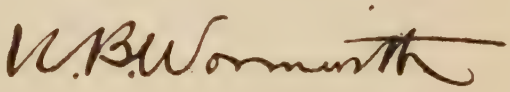
It was not until 1908 that Canada would agree again to discuss the matter of prohibiting pelagic sealing. Finally on May 15, 1911, an International Seal Conference, composed of representatives of the United States, Great Britain, Russia and Japan, met at Washington, and after nearly two months' deliberation came to an agreement for a treaty, which promises to furnish the most satisfactory solution yet found for this difficult problem. James Bryce, British ambassador at Washington, together with Sir Joseph Pope, under-secretary of state for External Affairs for Canada, represented Great Britain.

The terms of this treaty provide for the prohibition of pelagic or open-sea sealing for a period of fifteen years. Canada, as the only country interested which owns no seal rookeries, was able to secure favourable terms of compensation for desisting from pelagic sealing. Canada is to receive $200,000 cash advance from the United States; this to be used as the Dominion government sees fit, but probably in part in compensation to Canadian sealers for loss of their trade. This amount is to be repaid out of the sales from the sealskins received from the United States government.

The United States, Russia and Japan, owners of the seal rookeries, are to contribute to a general fund, the United States and Russia thirty per cent, and Japan fifteen per cent, of the skins they may obtain by land sealing. This fund thus obtained is to be divided between Canada and Japan, to compensate them for the suspension of their pelagic sealing operations. The United States gives Canada and Japan thirty per cent of her annual catch on the Pribyloff Islands, or fifteen per cent each; Russia gives Canada and Japan thirty per cent of her catch in Commander Islands, of which Canada gets ten per cent and Japan twenty. Japan gives Canada fifteen per cent of the catch on her rookeries on Robber Island. The rookeries in each case are now owned and operated by the government of the three respective nations. The catch of fur-seals on the Pribyloff Islands from 1867 to 1908 amounted to 2,494,176, valued in London at $31,850,097. The fur-seals taken in the same period in the open sea were 930,313, valued, as sold by the sealers, at $11,251,788.

Canada may be regarded as being a distinct gainer under this agreement. She is the only nation which has no rookeries to protect, and her pelagic sealing industry is so small that under present conditions it would have vanished in a few years. She is to receive more each year from the general fund contributed by the United States, Russia and Japan, than is earned by her sealers in the entire industry.

On August 15, 1912, the treaty was formally ratified by the United States Senate; and, as all the other powers to it had already given their assent, it is now effective. The Senate also enacted a provision prohibiting land-killing of seals on the Pribyloff Islands for a period of ten years. It is confidently expected that the treaty of 1912 will offer a practical and effectual solution of the fur-seal problem. The claims of all powers interested were fully satisfied, and, as regards Canada and the United States, its signature removes one of the last serious outstanding difficulties between them.



BOUNDARY DISPUTES AND TREATIES

BOUNDARY DISPUTES AND TREATIES

I

FROM FUNDY TO JUAN DE FUCA

Introductory

THE following article considers the international boundary between Canada and the United States from the Atlantic to the Pacific. So far as chronology is concerned, it includes negotiations and differences that commenced in 1782, and that have, in some instances, continued down to the present time and are, even yet, unsettled. Obviously, the demands of historical sequence require that these differences be examined from the initial to the final steps.

Boundary differences between Canada and the United States respecting the line between the Bay of Fundy and the Pacific can be most conveniently considered by a territorial division from east to west, which also approximates to a chronological division. They have been considered under the following heads :

(1) St Croix River Commission.
(2) Passamaquoddy Islands.
(3) Line from the source of the St Croix River to the River St Lawrence.
(4) Boundary through the River St Lawrence and Lakes Ontario, Erie, Huron and Superior and through the water-communications to the north-westernmost point of the Lake of the Woods.
(5) Lake of the Woods to the Pacific, including the 'Oregon' and 'San Juan' boundaries.

The important 'date-line' of the territorial history of

Canada is the preliminary treaty of 1782. On November 30, 1782, Richard Oswald, on the part of Great Britain, and John Adams, Benjamin Franklin, John Jay and Henry Laurens, on behalf of the United States, signed at Paris the provisional treaty of peace. It acknowledged the independence of the United States.

Article II provided

> that all disputes which might arise in future on the subject of the Boundaries of the said United States may be prevented, it is hereby agreed and declared, that the following are and shall be their Boundaries, viz. from the north-west angle of Nova Scotia, viz., that angle which is formed by a line drawn due north from the source of St Croix River to the Highlands; along the said Highlands which divide those rivers that empty themselves into the River St Lawrence, from those which fall into the Atlantic Ocean, to the north-western-most head of Connecticut River; thence down along the middle of that River, to the 45th degree of north latitude; from thence, by a line due west on said latitude, until it strikes the River Iroquois or Cataraquy; thence along the middle of said river into Lake Ontario; through the middle of said Lake until it strikes the communication by water between that Lake and Lake Erie; thence along the middle of said communication into Lake Erie; through the middle of said Lake until it arrives at the water-communication between that Lake and Lake Huron; thence along the middle of said water-communication into the Lake Huron; thence through the middle of said Lake to the water-communication between that Lake and Lake Superior; thence through Lake Superior, northward of the Isles Royal and Phelipeaux, to the Long Lake; thence through the middle of said Long Lake, and the water-communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said Lake to the most north-western point thereof, and from thence on a due west course to the River Mississippi, . . . East, by a line to be drawn along the middle of the River St Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands, which divide the Rivers that fall into the Atlantic Ocean from those which fall into the River

> St Lawrence; comprehending all Islands within 20 leagues of any part, of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid Boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy, and the Atlantic Ocean; excepting such Islands as now are, or heretofore have been, within the Limits of the said Province of Nova Scotia.

On September 3, 1783, David Hartley, on the part of Great Britain, and John Adams, Benjamin Franklin and John Jay, on the part of the United States, signed at Paris the definitive treaty of peace. Article II of this treaty—commonly known as the Treaty of Paris—is identical with Article II of the preliminary treaty.

The foregoing description of the boundaries was based, in part, upon the boundaries of Nova Scotia and Quebec as defined in various acts of state. For geographical information, the negotiators used Mitchell's map of North America, 1755. While it was in many respects a great advance on any maps that antedated it, the fact that much of the country was absolutely unexplored, and that much information obtained by the French was not available, effectually prevented anything like accuracy in the modern sense of the word. It was, in short, only the best compilation possible with the limited and inaccurate information available, and, unfortunately, most of the errors founded on its inaccuracies enured to the injury of Great Britain. The net result of these erroneous descriptions was that, instead of preventing disputes, they were exceedingly fruitful of them, and, on several occasions, brought the two nations to the verge of hostilities. An additional difficulty arose from the fact that the negotiators did not agree on an official map and attach it to the treaty.

St Croix River Commission

Hardly was the ink dry on the treaty, when disputes arose respecting the boundary. The first was with reference to the identity of the St Croix River. The initial point, by Article II,

was the 'north-west angle of Nova Scotia,' which was also the north-east angle of the United States, and, therefore, the determining factor of the eastern and northern boundaries.

On Mitchell's map the River St Croix is indicated as heading in a large lake called Kousaki, and emptying into a large unnamed bay evidently intended to indicate what we now call Passamaquoddy Bay. To the west of it is the Passamacadie River, emptying into a small inlet of the large unnamed bay and designated Passamacadie Bay. While there are two rivers falling into Passamaquoddy Bay proper, the eastern stream was, and is still, known as the Magaguadavic and the western as the Schoodic. A third stream, the Cobscook, falls into the bay of the same name. Though the latter is usually considered a portion of Passamaquoddy Bay, it may, from its geographical relations, be equally well considered a separate inlet of the Bay of Fundy. It is not certain whether the St Croix and the Passamacadie of the Mitchell map are one and the same stream, or whether the Passamacadie is not identical with the Cobscook. Ganong [1] attributes the error to the use by Mitchell of Southack's chart, 1733, and identifies Southack's River St Croix with the passage north of Deer Island, and his Passamaquoddy River with the passage to the south of it.

Britain claimed that the Schoodic was the true St Croix, and that the most distant spring on the western branch was the source. The United States claimed that the eastern stream, the Magaguadavic, was the St Croix, and that the most remote waters of the lakes at the head of its western branch were the source. Both streams drain lakes of considerable size, but, as the source of the Magaguadavic is in longitude 67° 12′ W, and the source of the west branch of the St Croix is in longitude 68° 10′ W, the question of identity involved the ownership of a strip nearly fifty miles wide, extending from the Bay of Fundy to the northern boundary of Maine.

When the Treaty of Paris, 1763, ceded Canada, Cape Breton, and the islands and coasts in the Gulf of St Lawrence to Great Britain, it became necessary to provide governments

[1] Ganong's *Boundaries of New Brunswick*, p. 267 *et seq.*

for the new possessions. Prior to the treaty, commissions to the governors of Nova Scotia merely described it as the 'province of Nova Scotia or Acadie in America.' On November 21, 1763, a commission as governor of Nova Scotia was issued to Montagu Wilmot. It defined his jurisdiction as extending over

> our Province of Nova Scotia, and which we have thought better to restrain and comprise within the following limits, viz. : To the northward our said Province shall be bounded by the southern boundary of our Province of Quebec, as far as the western extremity of the Bay des Chaleurs . . . although our said Province has anciently extended and does of right extend as far as the River Pentagoet or Penobscot, it shall be bounded by a line drawn from Cape Sable across the entrance of the Bay of Fundy to the mouth of the River St Croix, by the said River to its source, and by a line drawn due north from thence to the southern boundary of our Colony of Quebec.

The statement that Nova Scotia 'does of right extend' to the Penobscot was omitted from later commissions. The omission was, doubtless, compensation to Massachusetts for the surrender of her claims to the country immediately south of the St Lawrence, which by the proclamation of October 7, 1763, had been included in the new Province of Quebec.

The St Croix, therefore, for twenty years formed part of the boundary between Nova Scotia and the colony of Massachusetts Bay, and attempts at its identification were made by the authorities of the two colonies. In 1764 John Mitchel was instructed to determine its position. In his report he stated that the present Magaguadavic is 'R. St Croix called by modern Indians, but does not agree with Champlain.' The modern Digdeguash he designates the 'R. St Croix according to Champlain,' and an island at the mouth of Digdeguash Inlet is styled 'I. St Croix.' When in 1796-98 the United States commissioners were endeavouring to establish the Magaguadavic as the true St Croix, much stress was laid on this 'identification' by the Indians. That the Indians ever called this or any other stream falling into Passamaquoddy Bay, St Croix, is more than doubtful. This

statement was either suggested by some person with an ulterior motive, or made by the Indians because they thought Mitchel desired to identify that particular stream as the St Croix. In 1765 they stated to Morris that the Cobscook was the St Croix. With others, they agreed that the Schoodic was the St Croix. At the same time it is worthy of note that Mitchel was employed by Governor Bernard of Massachusetts Bay and that Morris was surveyor-general of Nova Scotia. Bernard had requested the government of Nova Scotia to make land grants to himself and to his friends. To have them as near his colony as possible, and, at the same time, to avoid the adverse criticism he would have received had he made grants to himself and his friends in the colony of which he was governor, the grants were to be made immediately east of the St Croix. In 1765 Nova Scotia granted 100,000 acres between the Schoodic and Cobscook to Bernard, Pownal, Thornton, Jackson and Mitchel, this area, doubtless, being selected to enlist Governor Bernard's influence in the attempt to secure recognition of the Cobscook as the St Croix.

So far as maps are concerned, the English maps, prior to 1763, showed the western boundary following the St Croix to its source and thence by a due north line to the River St Lawrence. This was doubtless due to a misreading of the grant to Sir William Alexander, which defined the boundary, in part, as following, from the source of the St Croix, an 'imaginary straight line which is conceived to extend through the land, or run northward to the nearest bay, river or stream emptying into the great river of Canada; and going from that eastward along the low shores of the same river of Canada.' Map-makers, being without any accurate knowledge of the geography of the territory, translated 'northward' as due north, and so indicated it on their maps. While this was obviously the only course then open to them, we now know that the line to the 'nearest' stream emptying into the St Lawrence would run about west-north-west to a point in the present county of Beauce, Quebec.

After the definition, by royal proclamation, in 1763, of the Province of Quebec, the boundary of Nova Scotia was

shown as following the due north line to the southern watershed of the St Lawrence, and thence, eastward, following the watershed.

Shortly after the signing of the treaty of 1783, the government of Nova Scotia, assuming the Schoodic to be the St Croix, made grants of land on its eastern bank to loyalist refugees. At the instigation of John Allan, a prominent revolutionary partisan, this action was promptly protested by the Massachusetts government.

A commission appointed to make an investigation, stated that the Magaguadavic was the St Croix of the treaty. Statements were obtained from John Jay and John Adams, two of the American negotiators of the treaty, and from the John Mitchel who, in 1764, had been employed on the same mission by Governor Bernard. Adams, in a letter dated October 25, 1784, states that the Mitchell map was used by the negotiators; that the 'St Croix, which we fixed on, was upon that map the nearest river to St Johns; so that in all equity, good conscience and honour, the river next the St Johns should be the boundary'—a somewhat novel line of argument.

On the strength of this report Governor Hancock of Massachusetts requested Governor Parr of Nova Scotia, in the interests of peace and harmony, to recall 'those subjects of His Majesty who have . . . planted themselves within this commonwealth.' Carleton, governor of the newly formed province of New Brunswick, replied that Great Britain considered that the Schoodic was the boundary.

As matters had reached an impasse, Congress in 1785 resolved that the United States minister at London be instructed to propose a settlement by negotiation, and, failing this, to propose a reference to a commission. Nothing was accomplished, however, and in 1790 the Senate advised that measures be taken to settle the dispute, and that 'it would be proper to cause a representation of the case to be made to the court of Great Britain, and, if said disputes can not be otherwise amicably adjusted, to propose that commissioners be appointed to hear and finally decide those disputes.'

Nothing was done till, in 1794, Jay negotiated a treaty for the adjustment of the differences. Article v of this treaty reads as follows :

> Whereas doubts have arisen what river was truly intended under the name of the River St Croix, mentioned in the said treaty of peace, and forming a part of the boundary therein described ; that question shall be referred to the final decision of commissioners to be appointed in the following manner, viz. :
>
> One commissioner shall be named by His Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof, and the said two commissioners shall agree on the choice of a third ; or, if they cannot so agree, they shall each propose one person, and of the two names so proposed one shall be drawn by lot in the presence of the two original Commissioners. . . . The said Commissioners shall, by a declaration, under their hands and seals, decide what river is the River St Croix, intended by the treaty. The said declaration shall contain a description of the said River, and shall particularize the latitude and longitude of its mouth and of its source. . . . And both parties agree to consider such decision as final and conclusive, so as that the same shall never hereafter be called into question, or made the subject of dispute or difference between them.

Thomas Barclay, of Annapolis, Nova Scotia, was appointed commissioner on the part of Great Britain. The president appointed General Knox as United States commissioner. He declined to serve, and David Howell, a prominent lawyer of Rhode Island, was appointed in his stead. In June 1796 Barclay and Howell had an informal meeting in Boston respecting the appointment of the third commissioner. Howell suggested the appointment of Egbert Benson of New York, 'who was Barclay's cousin of the half-blood, his father having been a half-brother of Barclay's mother.' No choice, however, was made, and it was agreed that each side should name 'three able and respectable characters' from the list of whom the opposite party should strike the names of two, and that the two remaining names

should be put into a box and that one should be drawn out to determine who should be the third commissioner.[1]

Ward Chipman, solicitor-general of New Brunswick, and James Sullivan, attorney-general of Massachusetts, were appointed agents on behalf of Great Britain and the United States respectively. Both agents applied themselves to the preparation of their respective cases. Chipman had the assistance of Phineas Bond, British consul at Philadelphia, Judge Pagan of New Brunswick, and others. Moore says: 'Among the "and others" there seems to have been a person who was able to supply the British minister and British consul at Philadelphia, in the early stages of the business, with copies of papers on which the United States relied, and probably with a copy of its claim.'

On August 21, 1796, Barclay and Howell met at Halifax. On comparing commissions, it was found that, while Howell's authorized him 'with the other commissioners duly sworn to proceed to decide the said questions and exactly perform all the duties conjoined and necessary to be done to carry the said fifth article into complete execution,' the commission to the British commissioner read: 'We will give and cause to be given full force and effect to such final decision in the premises as by our said Commissioner together with the other two commissioners above mentioned, *or the major part* of the said three Commissioners, shall duly be made according to the Provisions of the said Treaty.'

Barclay requested Howell to inform his government of the variance, that his commission might be altered to conform to that of the British commissioner.

> Mr Howell, who doubtless was not aware of the fact that on the 26th of the preceding July the Attorney-General of the United States, Mr Lee, had advised the Secretary of State that the concurrence of all three commissioners was necessary to a decision, declined to accede to this request, declaring that it was not only his own opinion but that of every man in office in the United States with whom he had conversed on the subject, that a declaration under the hands and seals of a majority of the commissioners would be final and conclusive.

[1] Moore's *International Arbitrations*, i. p. 9.

Barclay referred the matter to the British government, and Lord Grenville, though he considered the variation extremely unimportant, instructed the British minister to ask the government of the United States for a declaration that a decision of a majority of the commissioners would be accepted as valid. The minister, Robert Liston, misunderstanding the point at issue, asked for a declaration that the United States would give the decision of the commissioners 'full force and effect.' The secretary of state, Colonel Pickering, was hurt at the imputation that the United States would not keep faith, and Liston contented himself with a general declaration 'that the President would give the decision of the Commissioners full force and effect.' [1]

On August 26 Barclay and Howell, after a discussion of the point at issue with the agents, decided that, pending the appointment of the third commissioner, they could not perform any official act. By mutual agreement, in order to hasten the settlement, they advised the agents to proceed with the required surveys. The agents agreed to have surveys made of Passamaquoddy Bay, and of the Schoodic and Magaguadavic Rivers and their tributaries. On August 30 they agreed upon Egbert Benson as the third commissioner. Barclay assented to his appointment because he was convinced that, unless he did so, it would be decided by lot. To this he was averse, as he was convinced of the justice of the British claim. He wrote, 'To leave it therefore to a ballot, would be putting what I looked on as a certainty in hazard, a game I by no means conceived myself authorized to play.' This appointment was also warmly approved by Sullivan.

On October 4 the three commissioners met at St Andrews, N.B., and were duly sworn. The agents filed their respective memorials, Chipman claiming the Schoodic and Sullivan the Magaguadavic. The commissioners examined these rivers, and visited the island in the Schoodic identified by the British agent as the Ile St Croix described by Champlain.

[1] Rives's *Correspondence of Thomas Barclay.*

In July 1797 they met at Boston. President John Adams, one of the surviving American plenipotentiaries, deposed that Mitchell's map was the only one used in negotiating the treaty of 1783; that lines designating the boundaries of the United States were marked upon this map; that the British negotiators first claimed the Piscataqua; that the Americans claimed the St John, but, later, compromised on the boundary of Massachusetts Bay—the St Croix.

John Jay, another negotiator for the United States, deposed that

> it became a question which of the rivers in those parts was the true River St Croix, it being said that several of them had that name; that they did finally agree, that the River St Croix laid down in Mitchell's Map, was the River St Croix which ought to form a part of the said boundary line. . . . It seems to him that certain lines were marked on the copy of Mitchell's Map, which was before them at Paris, but whether the Map mentioned in the Interrogatory as now produced, is that copy, or whether the lines said to appear in it are the same lines, he cannot without inspecting and examining it, undertake to judge.[1]

In a letter written to Jefferson by Franklin, April 8, 1790 —nine days before his death—he also stated that they used Mitchell's map only, during the negotiations.

The foregoing was conclusive. The only question to be settled was: Which stream was the St Croix of Mitchell's map?

Passamaquoddy Indians swore that de Monts wintered in the Schoodic, but that he had erected a cross at the mouth of the Magaguadavic, and that the latter was the St Croix. As already stated, while Indian evidence respecting *occurrences* is sometimes trustworthy, their evidence respecting names given by white men is not to be relied on.

The agent of the United States presented a copy of Mitchell's map found in the office of the secretary of state. It was said to be the copy used by the United States negotiators at Paris, and contained a boundary marked

[1] Moore's *International Arbitrations*, i. p. 21.

in pencil. It was not presented during later negotiations, as the Americans were unable to establish its authenticity.

On March 15, 1798, Lord Grenville concluded with Rufus King, minister of the United States at London, an 'explanatory article' whereby the commissioners were released from the obligation to ascertain the latitude and longitude of the source of the St Croix. It provided that

> they shall be at liberty to describe the said river, in such other manner as they may judge expedient. . . . And to the end that no uncertainty may hereafter exist on this subject, . . . measures shall be concerted . . . in order to erect and keep in repair a suitable monument at the place ascertained and described to be the source of the said River St Croix.

On September 22, 1798, the arguments of the agents were closed. The commissioners entered upon the consideration of their decision on October 15, and rendered it on October 26.

There were four questions to be considered: (1) the intentions of the negotiators of the Treaty of Paris; (2) the identity of the River St Croix; (3) the boundaries of Nova Scotia; (4) the fulfilment of the conditions of the treaty.

1. Respecting the intentions of the negotiators, the evidence of Adams and Jay and Franklin's letter to Jefferson demonstrated that they had adopted the St Croix of Mitchell's map, and that it was only necessary to identify it; also, that the St Croix was adopted because it was the eastern boundary of Massachusetts Bay. Adams was emphatic on the latter point, and Franklin, in his letter, states that: 'I remember too, that in that part [the eastern] of the boundary, we relied much on the opinion of Mr Adams, who had been concerned in some former disputes concerning those territories.'

2. Respecting the identity of the St Croix: when the commissioners visited Dochet Island in October 1796 they had only the memorials of the commissioners appointed under the Treaty of Utrecht. In the following year, Chipman received a copy of Champlain's map. Excavations made at his instance on the site indicated by the map, dis-

closed the remains of de Monts' settlements. Comparison of this map with the maps made by their surveyors completed the identification with the Ile Ste Croix of Champlain, and proved decisive with the commissioners.

3. When it was decided that the Schoodic was the St Croix of Champlain and of the treaty, it remained to determine its identity from the mouth to its source. A short distance from its mouth this river divides into two branches. The eastern, and longer, rises about fifty miles north-north-west of the confluence, and flows through a series of lakes, known collectively as the Chiputneticook Lakes. The western branch rises about thirty-five miles west of the confluence and flows through Grand and Big Lakes. The British agent claimed that the western branch was the true St Croix, and that its source was to be found in its most distant spring, measuring from the mouth. He based his contention on the grant of Nova Scotia made by James I to Sir William Alexander in 1621. In this grant, the boundary follows a straight line from St Mary Bay to the mouth of Passamaquoddy Bay, thence, '*ad fluvium vulgo nomine Sanctae Crucis appellatum et ad scaturiginem remotissimam sive fontem ex occidentali parte ejusdem qui se primum praedicto fluvio immiscet*,' or, in English, 'to the river generally known by the name of St Croix, and to the remotest springs, or source, from the western side of the same, which empty into the first mentioned river.'[1] The British agent contended that this clause meant the most western spring draining into the St Croix. The United States agent contended that it meant the 'remotest springs' draining into the east branch on its western side. To a geographer, the American contention was special pleading, and without foundation. So far as the boundaries of Nova Scotia as defined in Alexander's grant were concerned, the British contention was unassailable. Prior to 1763, the commissions to the governors of Nova Scotia defined their jurisdiction as including 'our province of Nova Scotia or Acadie in America.' In the commission to Montagu Wilmot, 1763, two variations were introduced.

[1] Slafter's translation, quoted by Bourinot in *Transactions of Royal Society of Canada*, 1899, ii. p. 105.

It declared that, 'although our said province both anciently extended and doth of right extend [to the westward] as far as the River Pentagoet or Penobscot, it shall be bounded by a line drawn from Cape Sable across the entrance of the Bay of Fundy to the mouth of the River St Croix, by the said river to its source and by a line drawn due North from thence to the southern boundary of our colony of Quebec.' The first variation omitted all reference to the western branch. In the second variation the line from the source of the St Croix to the nearest branch of the St Lawrence was altered to read 'due north.' As we now know that the Alexander line ran west-north-west, to a point in what is now the county of Beauce, in approximate latitude 45° 55′, it is evident that the pedantry of a precisian in the office of the law-officers or in the Colonial Office lost to Great Britain the northern half of Maine.

Barclay and Benson contended that, inasmuch as the western branch had always been known as the Schoodic—the Indian name of the main stream—it was the St Croix. Howell argued that, as the eastern branch—then known as the Chiputneticook—was the larger stream, it was the St Croix. But while Barclay held that the most distant spring was the source, Benson put forward the extraordinary contention that the word 'source' referred to *the point at which it issued from the first lake.* He argued that 'a chain of lakes is not a river.' Howell agreed with him, but applied this curious dictum to the eastern branch, arguing that 'the source of a river is where it lodges itself in waters of a different denomination'—a novel doctrine, and one not likely to receive general acceptation.

4. The British agent cited in support of his contention for the western branch, that a due north line from it, and it only, would fulfil the conditions of the treaty.

In the Treaty of Paris the boundary is defined as proceeding from the north-west angle of Nova Scotia along the 'Highlands which divide those rivers that empty themselves into the River St Lawrence from those which fall into the Atlantic Ocean.' Barclay argued that a due north line from the source of the eastern branch 'will not intersect

the highlands here described, but will intersect the River Restigouche, which empties itself into the Bay of Chaleurs, which falls into the Gulf of St Lawrence, and will also intersect the Metabediac Lake, which is the head or source of the river likewise falling into the Bay of Chaleurs . . . the source of this branch of the Scoudiac or St Croix cannot be the source intended by the treaty of peace, because in such case we cannot arrive at the north-west angle of Nova Scotia.'[1] He pointed out that, if the highlands were south of the Restigouche, they would divide the waters that fall into the Gulf of St Lawrence from those that fall into the Atlantic; if north of the Restigouche, they would divide the waters of the River St Lawrence and those of the Gulf of St Lawrence; whereas a line from the source of the western branch of the St Croix would fulfil the conditions of the treaty 'except in that of the River St John, wherein it becomes *impossible*, by reason that the sources of this river are to the westward, not only of the western boundary-line of Nova Scotia, but of the sources of the Penobscot and even of the Kennebec, so that this north line must of necessity cross the St John.' The American agent replied that, as neither the north-west angle of Nova Scotia nor the highlands had been determined, there was no basis for argument. It is of interest to note that, later, Great Britain and the United States *reversed* their respective arguments.

Finally, Barclay conceded to Benson in fixing the source in the western branch at the outlet of Genesagenagumsis or Lesser Big Lake, and a declaration to that effect was drawn up, but Howell refused to sign. At this juncture Liston intervened. After conferences with Barclay, Chipman and Sullivan, it was agreed to accept the remotest spring of the eastern branch as the source of the St Croix. As compared with the line from Lesser Big Lake, this gave the United States an area of about one hundred and forty square miles lying to the north and west of the confluence; but, north of Chiputneticook Lake, Great Britain gained a strip eleven miles wide, and the boundary, instead of intersecting the St John four miles west of Grand Falls, as at present, would have inter-

[1] *American State Papers, Foreign Relations*, vi. p. 919.

sected it twice, near the present town of Woodstock, and, again, below Presqu'ile.

Considered on this basis, the settlement was the most advantageous Great Britain could have made, and the United States commissioner and agent probably agreed to it to save the grants made by Massachusetts in the triangular area above referred to. While the contentions of Howell and Benson were geographically absurd, the fact that the Indians applied the same name to the western branch as to the main stream did not in any way affect the name given by the French, which was a thing apart. But, in this case, the identification of the Ile Ste Croix of the French explorers of 1604 demonstrated that the Schoodic and the St Croix were identical, and thus determined the identity of the lower portion of the historical St Croix. The grant to Sir William Alexander in 1621, in set terms, applies the name to this river from the mouth in Passamaquoddy Bay to the most distant spring of the western branch—conclusive evidence of the correctness of Barclay's contention. But between Benson's absurd ideas respecting geographical usage, and Howell's claim for a point on the east branch—forty-five miles from its source—Barclay wisely agreed to a compromise. On the other hand, this territorial loss to Great Britain is, as above stated, largely due to the pedantry of the draughtsman of Montagu Wilmot's commission.

'Mr Howell declined being a party to the declaration until it was engrossed and ready for execution. He then reluctantly directed his name to be inserted in the Declaration, which he eventually signed.' [1]

The declaration of the commissioners was signed October 25, 1798. They decided that the river specifically designated on an attached map—the Schoodic to the junction of the eastern and western branches, and, thence the eastern branch to its remotest spring—was

> the River truly intended under the name of the River St Croix, in the said Treaty of Peace, and forming a part of the boundary therein described ; that is to say, the mouth of the said river is in Passamaquoddy Bay, at

[1] Rives's *Correspondence of Thomas Barclay*, p. 93.

> a point of land called Joe's Point . . . and the course of the said river up from its said mouth, is northerly to a point of land called the Devil's Head, then turning the said point, is westerly to where it divides into two streams, the one coming from the westward, and the other coming from the northward, having the Indian name of Chiputnaticook . . . then up the said stream, so coming from the northward, to its source.[1]

The day the declaration was signed, Sullivan wrote Timothy Pickering, secretary of state, that he had 'filed a memorial urging the Commissioners to fix the mouth between Deer and Moose Islands or between Deer Island and Letite Point in the Bay of Fundy, but they declined it under an idea that unless Passamaquoddy was a section of the Bay of Fundy the St Croix had no mouth in that Bay.'[2] He further stated, and as the sequel shows, correctly, that 'If the bay of Passamaquoddy is not considered as sea a negociation may be yet necessary.'

The work of the St Croix Commission did not decide the ownership of the islands in the St Croix River, nor did it define the boundary through its lake-expansions—the Chiputneticook Lakes. On April 11, 1908, a treaty was signed at Washington providing for the demarcation of this portion of the boundary. Article II provided for the appointment by each nation of a commissioner, the commissioners so appointed to lay down upon accurate modern charts, 'the line of boundary along the middle of the River St Croix from its mouth to its source,' the line of boundary to be a water line throughout and to follow the centre of the main channel or thalweg, except where it would conflict with the recognized national status of an island; that, failing agreement within six months, each party should submit its case to an arbitrator, whose decision should be final. It further provided for the establishment of boundary monuments, ranges and buoys.

Up to March 1913 the St Croix had been surveyed, under the provisions of this treaty, from the source to the mouth; the boundary had been determined, except at one point where

[1] *American State Papers, Foreign Relations*, vi. p. 921.

[2] MSS., Department of State, quoted in Moore's *Treaties and Arbitrations*, i. p. 32.

decision was reserved, and reference monuments had been placed on the bank of the river.

Passamaquoddy Islands

Article II of the Treaty of Paris defined the eastern boundary of the United States as follows :

> East by a line to be drawn along the middle of the River St Croix, from its mouth in the Bay of Fundy to its source . . . comprehending all Islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid Boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean ; excepting such Islands as now are, or heretofore have been, within the Limits of the said province of Nova Scotia.

The obvious intent was to confirm to the United States all the islands within the area bounded on the north and west by the eastern coast-line of the United States, and on the east and south by a line drawn parallel to said coast and distant twenty leagues therefrom, saving the islands, in this area, if any, appertaining to Nova Scotia. Such a belt would, obviously, be bounded at each extremity by lines *drawn at right angles to the boundaries of the belt.* This condition is only fulfilled by a due east line from the mouth of the St Mary and a due south line from the St Croix.

Again, we have conclusive evidence in the King George III map,[1] where the boundary is drawn ' as described by Mr Oswald.' On this map the line is drawn parallel to the Atlantic coast and approximately twenty leagues therefrom, till it reaches a point about six leagues from the western extremity of Nova Scotia, and due south from the mouth of the St Croix. It then ascends to the latter but is curved to the westward, so as to include Grand Manan and ' Passamacadie ' islands in Nova Scotia ; thence by a right line to the St Croix. Moreover, Grand Manan is coloured red to

[1] *Infra*, p. 823.

indicate that it formed part of Nova Scotia. The foregoing amounts, almost, to a demonstration of the correctness of the theory that 'due east' is a slip of the pen for 'due south.'[1] Any other theory attributes striking incapacity to the astute negotiators of 1782. The King George III map would have been conclusive evidence had it been produced, but it was not produced, either because it had been forgotten, or because it would have been detrimental to, if not destructive of, the British claim respecting the 'Highlands.'

The original error occurs in the statement of boundaries claimed by the Congress of the Confederated States, August 19, 1779, but was not known till the Secret Journals of Congress were published in 1821. The *lapsus calami* is probably due to the draughtsman having in his mind the fact that the Atlantic coast of North America has a general north-and-south trend. Any question respecting the ownership of these islands, however, was covered by the exception of islands that were, or had been, within the limits of Nova Scotia.

Disputes soon arose respecting the ownership of Moose, Dudley and other islands which were claimed by the British and by United States authorities. The British claim was based on the grant to Sir William Alexander in 1621, and was strengthened by the fact that the authorities of Nova Scotia had exercised jurisdiction over all the larger islands. The British authorities had granted Moose Island, in 1764, to Governor Bernard and others, and made grants of Deer and Campobello Islands in 1767. Grand Manan Island had been reserved pending the issuance of a grant to Sir William Campbell, and Nova Scotia courts established at St Andrews and Campobello had exercised unprotested jurisdiction over Moose and other islands. On the other hand, Massachusetts had not, prior to the treaty of peace, made any effort to exercise jurisdiction in this region.

In 1784 Massachusetts surveyed Moose, Dudley and

[1] Moore (*Treaties and Arbitrations*, i. p. 45) says: 'The negotiators of the treaty of peace seem to have considered Passamaquoddy Bay either merely as a part of the Bay of Fundy, or else as the mouth of the St Croix River.' Ganong (*Boundaries of New Brunswick*, p. 279) also accepts Moore's theory, although a due east line would cut off part of the mainland of what is now New Brunswick.

Frederick Islands, and sold Dudley Island. In 1785 the inhabitants of Moose Island, when summoned by the high sheriff of Charlotte county, New Brunswick, to attend St Andrews courts as jurymen, refused to do so. On September 22, 1785, John Jay, secretary for Foreign Affairs, advised garrisoning by Massachusetts 'without noise or delay.'[1] Congress, however, resolved that Rufus King, United States minister at London, be instructed to attempt a settlement. Nothing was accomplished.[2] As noted above, Sullivan, the American agent of the St Croix Commission, insisted that the mouth of the St Croix be fixed among the islands. The British agent declined to consider the proposition, and, in a letter to Governor Carleton, December 26, 1798, he says: 'The Agent of the United States did not seem to be aware during the discussion of the case that the right to the islands would be at all affected by the decision respecting the mouth of the river, and therefore did not in any respect combat any of my arguments upon this point.' Later, Sullivan apparently discovered the effect of the decision, and protested that the treaty of peace never contemplated the inclusion of Passamaquoddy Bay in the Bay of Fundy; that the mouth should be in the Bay of Fundy; and that he conceived it should be between Letite Point and Deer Island or between Deer and Moose Islands. The commissioners, however, adopted Chipman's contention that they were simply charged with the determination of the St Croix River of the treaty of peace. This left the question of the islands where it was before, except that the point at issue was more clearly defined.

In 1801 Rufus King was instructed to enter into negotiations for a settlement of the title to the islands and to navigation of the channels between them. On May 12, 1803, he concluded with Lord Hawkesbury a convention commonly

[1] Ganong's *Boundaries of New Brunswick*, p. 283.

[2] The treaty of 1783 had never been complied with by the United States in its exact terms, and the British government did not send a diplomatic representative to the United States until 1791. 'In 1788, when Mr Adams was about leaving London, he was given to understand that, until a national government was established capable of enforcing its obligations, it was useless to send a Minister' (Foster, *A Century of American Diplomacy*, p. 159).

known as the King-Hawkesbury Convention. By the first article it was provided that :

> The Line hereinafter described shall and hereby is declared to be the Boundary between the mouth of the River Saint Croix and the Bay of Fundy ; that is to say, a Line beginning in the middle of the channel of the River Saint Croix, at its mouth (as the same has been ascertained by the Commissioners appointed for that purpose) ; thence through the middle of the channel between Deer Island, on the East and North, and Moose Island and Campo Bello Island, on the West and South, and round the eastern point of Campo Bello Island, to the Bay of Fundy. And the Islands and Waters Northward and Eastward of the said Boundary, together with the Island of Campo Bello, situated to the Southward thereof, are hereby declared to be within the Jurisdiction and part of His Majesty's Province of New Brunswick ; and the Islands and Waters Southward and Westward of the said Boundary, except only the Island of Campo Bello, are hereby declared to be within the Jurisdiction and part of Massachusetts.

The United States Senate amended the treaty by striking out the fifth article respecting the boundary between Lake of the Woods and the Mississippi. As Great Britain refused to accept the amendment, it was never ratified, though the proposed division of the islands was the same as in the final settlement. A similar agreement, proposed by Lords Holland and Auckland, and Messrs Monroe and Pinkney, in 1807, failed on account of differences respecting concurrent negotiations.

On December 24, 1814, Lord Gambier, Henry Goulburn and William Adams, on behalf of Great Britain, and John Q. Adams, James A. Bayard, Henry Clay, Jonathan Russell and Albert Gallatin, on behalf of the United States, signed at Ghent the treaty that closed the War of 1812-14. Though it was negotiated on the basis of the *status quo ante bellum*, Great Britain refused to consider the Passamaquoddy islands as territory 'taken by either Party from the other during the War.' The treaty provided that 'Such of the islands in the Bay of Passamaquoddy as are claimed by both Parties,

shall remain in the possession of the Party in whose possession they may be at the time of the exchange of the Ratifications of this Treaty, until the decision respecting the title to the said Islands shall have been made in conformity with the IVth Article of this Treaty.' In effect, pending the decision of the commission appointed under Article IV, the treaty confirmed Great Britain in possession of Moose Island, which she had seized during the war.

Article IV provided that, to decide the conflicting claims to the Passamaquoddy Bay islands, the differences should be referred to commissioners, one to be appointed by Great Britain and one by the United States; that the commissioners should impartially examine and decide upon the claims according to such evidence as should be laid before them on the part of His Britannic Majesty and of the United States, respectively; that they should decide to which of the two contracting parties the several islands respectively belonged, in conformity with the true intent of the treaty of peace of 1783; that if the commissioners should agree in their decision, both parties should consider such decision as final and conclusive; that, if the commissioners should differ upon any of the matters so referred to them, or both or either refuse, or decline, or wilfully omit to act as such, they should make, jointly or separately, a report or reports, to both governments, stating the points of difference and the grounds upon which their respective opinions were based; that the report or reports should then be referred to some friendly sovereign or state, to decide on the differences; and that the decision of such friendly sovereign or state should be final and conclusive.

Under this article, Thomas Barclay, who had been British commissioner on the St Croix Commission, was appointed as commissioner for Great Britain. John Holmes, a prominent citizen of Massachusetts, was appointed commissioner for the United States. Ward Chipman, who had filled a similar position on the St Croix Commission, was appointed agent for Great Britain, and his son, of the same name, was joint agent. James T. Austin, a prominent lawyer of Massachusetts, was appointed agent for the United States.

Lord Castlereagh's instructions to Barclay indicated that the British right was based on the treaty of 1783, which expressly excepted 'such Islands as now are or heretofore have been within the Limits of Nova Scotia'; that Nova Scotia had exercised jurisdiction up to 1783; that the Alexander grant was conclusive, inasmuch as it included all islands within six leagues of any part of the circumference, and that, during the proceedings before the St Croix Commission, the American agent had objected that fixing the mouth of the river at Joe Point had conferred upon Great Britain title to the disputed islands. Barclay, in his reply, stated that the British case was incontrovertible except with regard to Grand Manan, the most important of all.

At the first meeting of the commissioners, held at St Andrews, N.B., on September 23, 1816, the United States commissioner objected to the commission presented by Ward Chipman, Sr., because it was a letter from Lord Bathurst, secretary for War and for the Colonies, conveying 'the commands of' the Prince Regent that he 'act as agent to the Commission.' After discussion, it was agreed that Chipman should act as agent, pending the issue of a formal commission. The commission to him and to his son, empowering them to act jointly or severally, was issued on January 24, 1817.

The agent for Great Britain claimed Grand Manan and all the islands in Passamaquoddy Bay on the ground that they were 'within the Limits of Nova Scotia.' The United States agent claimed them as being 'within twenty leagues' of the shores of the United States and included between the due east lines from the St Croix and St Mary Rivers and as being without the limits of Nova Scotia. After agreeing to accept as authoritative the maps and plans of the St Croix and Passamaquoddy Bay, compiled for the St Croix Commission, they adjourned.

In June 1817 the agents presented their memorials and arguments. On September 25 following the commissioners met in Boston to hear the replies of the agents, the hearing being concluded on October 1. Both agents requested a further

hearing, and suggested an adjournment till the following spring. On October 8, after considerable discussion, the commissioners announced that the agents had 'done honor to themselves and justice to their respective Governments,' and that it was 'therefore inexpedient that they should be further heard.' [1]

Great Britain claimed Grand Manan Island and all the islands in Passamaquoddy Bay as being within the limits of Nova Scotia. The grant of Nova Scotia to Sir William Alexander, 1621, translated from the Latin original, reads :

> All and singular, the lands of the Continent, and islands situated and lying in America, within the head or promontory commonly called Cape of Sable, lying near the forty-third degree of north latitude, or thereabouts ; from this Cape, stretching along the shores of the sea, westward to the roadstead of St Mary, commonly called St Mary's Bay, and thence northward by a straight line, crossing the entrance, or mouth, of that great roadstead [2] which runs towards the eastern part of the land between the countries of the Suriqui and Etchimini, commonly called Suriquois and Etechemines, to the river generally known by the name of St Croix . . . including and containing within the said coasts and their circumference, from sea to sea, all lands of the continent, with the rivers, falls, bays, shores, islands, or seas, lying near or within six leagues on any side of the same on the west, north or east sides of the same coasts and bounds.

This grant indubitably included all the territory lying to the east of the line from the entrance of St Mary Bay to the mouth of the St Croix. This line intersects Grand Manan, leaving about one-third of its area to the east of it and two-thirds to the west. It bisects Campobello. Nearly the whole of Deer Island lies to the east of it. Great Britain claimed that the grant included all islands within six leagues of the *bounding lines*, as well as those within six leagues of the shores. The United States claimed that the six-leagues line was to be drawn parallel to the shores, and that all

[1] MSS., Department of State, quoted in Moore's *Treaties and Arbitrations*, i. p. 55.

[2] Bay of Fundy.

islands in the Bay of Fundy and outside it belonged to the United States, provided they were within twenty leagues of the shores of the United States. A second question also arose : Did the Alexander grant fix the limits of Nova Scotia, or had they been affected by the commissions to governors of the province between 1763 and 1783? The commission to Montagu Wilmot, 1763, defines his jurisdiction as bounded on the westward 'by a Line drawn from Cape Sable across the entrance of the Bay of Fundy to the mouth of the River St Croix,' etc. The commissions to Lord William Campbell, August 11, 1765, and to Francis Legge, July 22, 1773, use the same phraseology. In all three commissions, the eastern boundary includes 'the said Bay [Chaleur] and the Gulf of St Lawrence, to the cape or promontory called Cape Breton, in the island of the same name, including that Island, the Island of St John, and all other Islands within six leagues of the coast,' etc.,[1] but no mention is made of islands lying to the westward of the line from St Mary Bay to the St Croix.

In the discussions that took place between October 2 and 9, the United States commissioner, at first, contended that there could be no question respecting the meaning of the Alexander grant, so far as it affected the islands; that 'the Crown had decided it repeatedly in the Commissions to the Governors of Nova Scotia, wherein the Limits of Nova Scotia were defined. He referred to the Commission to Montagu Wilmot Esqr., in 1763, wherein all Islands on the North and East within six leagues of the *Coasts*, are declared to be within the Limits of Nova Scotia, and to the Southward, all Islands within forty Leagues of the *Coast*, but that to the Westward no mention was made of Islands.' The British commissioner argued that the commissions were usually 'penned in haste, by Clerks in the public offices, and intended merely as instructions to Governors, not as acts which were to bind His Majesty on other points and the foreign powers; because, if Declarations contained in such Commissions could not bind foreign Powers, it was unreasonable that the Power making such Declarations and possibly with private views confined to its own Subjects

[1] *American State Papers, Foreign Relations*, vi. p. 917.

should be bound thereby,' etc. After further discussion, Barclay asked Howell to unite in a decision that all the islands belonged to Great Britain. Howell refused on the ground that Moose, Frederick and Dudley Islands had been awarded to the United States by the convention of 1803 and by the treaty of 1807; that, though neither treaty had been ratified, on both occasions Great Britain had been willing to relinquish her claims to them in return for an acknowledgment of her title to the other islands in Passamaquoddy Bay; that, if this division was not satisfactory to Barclay, they would have to report their differences to their respective governments for reference to some friendly sovereign or state for decision, as provided by the Treaty of Ghent—which decision, he argued, could not possibly be more adverse to the claims of the United States, and might be more favourable than that proposed by Barclay.

Barclay communicated to Chipman the substance of this discussion. They were agreed that a friendly sovereign would probably adopt the line fixed upon—though not ratified—in 1803 and in 1807; that this would leave the ownership of Grand Manan for a separate decision, and that this island, which was more valuable than all the Passamaquoddy islands combined, might be lost to Great Britain; or the friendly power might decide that 'the small portion of it belonged to His Majesty, and the remainder to those States.' On October 6 Barclay informed Howell that he would agree to yield Moose, Dudley and Frederick Islands to the United States, on condition that the other islands in Passamaquoddy Bay and Grand Manan be awarded to Great Britain. Howell was astonished at a serious claim to Grand Manan being put forward by Great Britain, but eventually offered to give up Grand Manan in return for Campobello. Barclay informed him that he had his ultimatum. It was not until the morning of the 9th that he could induce Howell to agree to these terms, 'and then with great reluctance and apparent Hesitation, and only on condition that I would unite with him in a Letter to both Governments, expressive of our opinion that the Eastern Passage from the Bay of Passamaquoddy was common to both nations.'

Howell's 'reluctance' and 'hesitation' are understandable. There is no doubt that a reference to a friendly sovereign, as provided by the treaty, would have resulted in a settlement as favourable to the United States, and, probably, more favourable. Moose Island was the only island of importance awarded to the United States. As the channel between it and the mainland is unnavigable, it properly belongs to the State of Maine. Frederick and Dudley Islands are very small islands, dependent upon Moose. In addition, Moose Island had been granted to citizens of the United States.

As President Monroe in his first annual message, December 2, 1817, only expressed 'satisfaction' with the division of the islands in Passamaquoddy Bay, and omitted all reference to Grand Manan, Barclay surmised that the president 'felt sore on the point.'

The commissioners reached an agreement on October 9, 1817, and on November 24 executed the award. They decided that

> We . . . have decided, and do decide, that Moose Island, Dudley Island and Frederick Island, in the Bay of Passamaquoddy, which is part of the Bay of Fundy, do, and each of them does, belong to the United States of America; and we have also decided, and do decide, that all the other islands, and each and every one of them, in the said Bay of Passamaquoddy, which is part of the Bay of Fundy, and the island of Grand Menan, in the said Bay of Fundy, do belong to his said Britannic Majesty.[1]

This decision settled the title to the islands, but did not delimit the boundary-line through the water channels. As a result, there were numerous disputes respecting the national title to certain fishing-grounds, and these disputes frequently became violent. The lack of definition was also taken advantage of by smugglers and other law-breakers. On July 22, 1892, a convention respecting the boundaries between

[1] *Treaties and Conventions between the United States and other Powers*, 1776-1887, p. 406.

Canada and the United States was signed at Washington. By Article II it was agreed that the contracting parties should

> appoint two Commissioners, one to be named by each party, to determine upon a method of more accurately marking the boundary line between the two countries in the waters of Passamaquoddy Bay in front of and adjacent to Eastport, in the State of Maine, and to place buoys or fix such other boundary marks as they may determine to be necessary.

Wm. F. King of Ottawa was appointed commissioner on behalf of Great Britain, and T. C. Mendenhall on behalf of the United States. They met at Washington in March 1893. A basis of agreement was decided on, viz.: that, so far as possible, the line should be drawn so as to give each nation equal water areas; that the boundary should consist of a series of straight lines, the angles being marked by buoys and range marks on the shores, and that the number of lines should be reduced to the minimum. It was further agreed that it should be marked from Joe Point—fixed by the St Croix Commission as the mouth of the St Croix River —to West Quoddy Head, opposite the southern entrance to the channel between Campobello Island and the mainland. Based on these principles, the major portion of the line was laid down on charts, and, later, marked by buoys and shore marks.

Differences arose, however, respecting a small island—Mark Island or 'Popes Folly Island.' The commissioners were also unable to agree respecting the ownership of Cochran Ledge, opposite Eastport. Another difficulty arose respecting certain fishing-grounds south of Lubec Narrows. The American commissioner agreed that the line should be drawn along the dredged channel which passes to the westward of the natural channel, but the United States fishermen forwarded strong protests to Washington, and the matter remained unsettled. On April 11, 1908, a treaty respecting the demarcation of the boundary between Canada and the United States was signed at Washington. By Article I the contracting parties agreed that each should appoint an expert geographer or surveyor to serve as a commissioner to define and mark the international

boundary-line through Passamaquoddy Bay. It confirmed the marking of the line so far as it had been carried by the commission of 1892. The cases were exchanged on December 3, 1908; the counter-case for the arbitration proceedings was prepared but was not presented to the United States government.

In May 1909 Wm. F. King was instructed to confer with Chandler P. Anderson, representing the United States department of State, with a view to a settlement. These negotiations were without result, and the twelve months from ratification elapsed without agreement between the governments. To adjust the matter a treaty was signed at Washington on May 21, 1910. It conceded Popes Folly Island to the United States, and the fishing-grounds south of Lubec to Great Britain.

Up to March 1913 no field-work had been done under Article I of the International Boundary Treaty of 1908.

The 'Due North' and 'Highlands' Lines

Having disposed of the southern portion of the boundary between New Brunswick and Maine, the next dispute to be considered is that concerning the line between the source of the St Croix River and the St Lawrence. Though it was only acute respecting the north-eastern boundary of Maine, it involved the whole line to the St Lawrence.

The decision of the commissioners appointed under Article IV of the Treaty of Ghent fixed the source of the St Croix, but left unsettled the whole question of the boundary from that point northward and westward.

The Treaty of Paris, 1783, defined the boundaries of the United States, in part, as follows:

> From the north-west angle of Nova Scotia, viz., that angle which is formed by a line drawn due north, from the source of Saint Croix River to the Highlands; along the said Highlands which divide those rivers that empty themselves into the River St Lawrence, from those which fall into the Atlantic Ocean, to the north-westernmost head of Connecticut River; thence down along the

> middle of that River, to the forty-fifth degree of north latitude; from thence, by a line due west on said latitude, until it strikes the River Iroquois or Cataraquy; thence along the middle of said river. . . . East, by a line to be drawn along the middle of the River St Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands which divide the Rivers that fall into the Atlantic Ocean from those which fall into the River St Lawrence, etc.

An examination of this description indicates that the basal point is the 'north-west angle of Nova Scotia,' which is defined as the intersection of the due north line from the St Croix to the 'highlands.' As the source of the St Croix was already determined, the determination of the due north line was a simple matter of careful surveying. Though the meaning of the word 'highlands' is plain, viz., lands that are high enough to form a water-parting between the streams that flow into the St Lawrence and those that flow to the Atlantic, and are, therefore, higher than the surrounding country, yet the controversy raged for over half a century and, on several occasions, brought two great nations to the verge of war.

The primary error respecting the meaning of the word 'highlands' as used in the treaty of peace seems, strangely enough, to be attributable to a citizen of the United States, James Sullivan, who was, later, agent for the United States on the St Croix Commission. In a map accompanying his *History of the District of Maine*, a continuous range of mountains following the southern watershed of the St Lawrence is shown, and is designated 'High Lands being the boundary-line between the United States and the British Province of Quebec.' In 1798, three years later, when presenting the United States case before the St Croix Commission, 'he declared that the question of the highlands was "yet resting on the wing of imagination," and that the "point of locality of the north-west angle" was "to be the investigation of the next century"—a prophecy remarkably fulfilled.' [1] In 1802, apparently in reply to a request, he wrote President Madison a lengthy memorandum respecting the islands in the Bay of

[1] Moore's *Treaties and Arbitrations*, i. p. 66.

Fundy and the 'highlands' line. Referring to the latter, he wrote:

> The line which runs north from the source of the St Croix, crosses the river St John, a great way south of any place which could be supposed to be the highlands; but, where that line will come to the north-west angle of Nova Scotia and find its termination, is not easy to discover. . . . Commissioners who were appointed to settle that line, have traversed the country in vain to find the highlands designated as a boundary. I have seen one of them, who agrees with the account I have had from the natives and others, that there are no mountains or highlands on the southerly side of the St Lawrence, and north-eastward of the River Chaudière; that, from the mouth of the St Lawrence to that river, there is a vast extent of high, flat country, thousands of feet above the level of the sea in perpendicular height, being a morass of millions of acres, from whence issue numerous streams and rivers, and from which a great number of lakes are filled by drains; and that the rivers, originating in this elevated swamp, pass each other, wide asunder, many miles in opposite courses, some to the St Lawrence, and some to the Atlantic Ocean.
>
> Should this description be founded in fact, nothing can be effectively done, as to the Canada line, without a commission to ascertain and settle the place of the north-west angle of Nova Scotia. Wherever that may be agreed to be, if there is no mountain or natural monument, an artificial one may be raised; from thence the line westward to Connecticut River may be established by artificial monuments. . . . Though there is no such chain of mountains as the plans or maps of the country represent under the appellation of the highlands, yet there are eminences from whence an horizon may be made to fix the latitude from common quadrant observations.[1]

The Sullivan letter has been quoted at length because it formed the basis of representations made by the United States; it indicates clearly the erroneous ideas entertained respecting the meaning of 'highlands'; it is highly probable that, had it never been written, the British government

[1] Amory's *Life of Sullivan*, ii. pp. 405-6.

would not have raised the question, nor could it have been done so effectively but for this remarkable concession of United States diplomacy.

James Madison, secretary of state, requested this information, as he had already opened negotiations for the settlement of the boundary in Passamaquoddy Bay, and desired to include the remainder of the line in a general settlement. In his instructions to Rufus King, United States minister at London, he said it had been found that the highlands had no definite existence. He therefore suggested that a commission, similar to the St Croix Commission, should be appointed

> to determine on a point most proper to be substituted for the description in the second article of the treaty of 1783, having due regard to the general idea that the line ought to terminate on the elevated ground dividing the rivers falling into the Atlantic, from those emptying themselves into the St Lawrence. The commissioners may also be authorized to substitute for the description of the boundary between the point so fixed, and the north-westernmost head of Connecticut river, namely, a line drawn along the said highlands, such a reference to intermediate sources of rivers, or other ascertained or ascertainable points, to be connected by straight lines, as will admit of easy and accurate execution hereafter, and as will best comport with the apparent intention of the treaty of 1783.[1]

The suggestion in these instructions that the 'highlands' contemplated by the treaty were necessarily a mountainous tract of country can be traced to Sullivan's memorandum quoted above. 'Though the idea underlying the intimation obviously was, that the substituted line should be drawn as nearly as possible through the region where the "highlands" had been supposed to exist, yet the letter of Mr Sullivan[2]

[1] *American State Papers, Foreign Relations*, ii. p. 585.

[2] Gallatin, in a letter to Chas. S. Davies, June 14, 1839, said: 'Governor Sullivan's blunder in that respect was the source whence arose our difficulties, and which led our Government to declare, in fact, that in its opinion there were, in the topography of the country, obstacles to the execution of the treaty' (Adams, *Writings of Gallatin*, ii. p. 546).

'Even in America, where the term "dividing highlands" is generally used,

and the instructions of Mr Madison having been communicated to Congress and thus made a matter of public record, conceded a point which it was never possible to regain.'[1]

On May 12, 1803, Lord Hawkesbury and Rufus King signed at London a Convention of Boundary between Great Britain and the United States. Article II provided that:

> Whereas it has become expedient that the North-west Angle of Nova Scotia, mentioned and described in the Treaty of Peace between His Majesty and the United States should be ascertained and determined . . . it is agreed that for this purpose [three] Commissioners shall be appointed . . . to ascertain and determine the said North-west Angle of Nova Scotia, pursuant to the Provisions of the said Treaty of Peace, and likewise to cause the said Boundary Line . . . to be run and marked according to the Provisions of the Treaty aforesaid.[2]

The United States Senate desired to insert an explanatory article respecting the boundary-line between the Lake of the Woods and the Mississippi. This the British government refused to accept. A similar settlement attempted in 1807 by Lords Auckland and Holland, and Messrs Pinkney and Monroe, also came to naught, owing to differences respecting impressment, etc.

On February 15, 1814, the House of Assembly of New Brunswick resolved that a committee should be appointed to prepare a petition to the Prince Regent praying that, when negotiations for peace took place, he would 'direct such measures to be adopted as he may think proper to alter the boundaries between those States and this Province, so as that the important line of communication between this and the neighbouring Province of Lower Canada, by the River Saint John, may not be interrupted.'[3]

The importance of securing this territory to Canada was

some otherwise well-informed men, such as Mr Sullivan, were not acquainted with its technical meaning' (Gallatin, *Right of the United States to the North-eastern Boundary*, p. 32).

[1] Moore's *Treaties and Arbitrations*, i. p. 68.

[2] *British and Foreign State Papers*, i. p. 1637.

[3] Ganong, *Boundaries of New Brunswick*, p. 314.

thoroughly appreciated by the New Brunswick authorities. They recognized that the due north line would cut off the portion of the St John Valley lying above Grand Falls. Ward Chipman, Governor Carleton and others conceded it, but hoped that British diplomacy would effect a satisfactory arrangement. Thus Chipman, in 1799, suggested that the right of navigation between the islands of Passamaquoddy Bay might be conceded to the United States in return for an alteration of the boundary that would preserve the Madawaska settlements to Great Britain.

It was probably due to the New Brunswick petition that, at the first conference of the British and American negotiators of the Treaty of Ghent, August 8, 1814, the former proposed 'a revision of the boundary-line' between the British and American territories 'merely for the purpose of preventing uncertainty and dispute.' Later, they explained that their proposal involved 'such a variation of the line of frontier as may secure a direct communication between Quebec and Halifax.' To this proposition the American negotiators replied that 'under the alleged purpose of opening a direct communication between two of the British provinces in America, the British government requires a cession of territory, forming a part of one of the States of the American Union. . . . They have no authority to cede any part of the territory of the United States, and to no stipulation to that effect will they subscribe.'

The British negotiators replied that the boundary of the district of Maine had 'never been correctly ascertained; that the one asserted, at present by the American Government by which the direct communication between Halifax and Quebec becomes interrupted, was not in contemplation of the British plenipotentiaries who concluded the treaty of 1783.' They explained that 'the British Government never required that all that portion of the State of Massachusetts intervening between the provinces of New Brunswick and Quebec should be ceded to Great Britain, but only that small portion of unsettled country which intercepts the communication between Quebec and Halifax; there being much doubt whether it does not already belong to

Great Britain.' The United States commissioners declared 'that they did not decline discussing any matter of uncertainty or dispute respecting the boundaries,' and that they were 'prepared to propose the appointment of commissioners by the two governments to extend the line to the Highlands conformably to the treaty of 1783.' On November 10 they proposed that articles be inserted in the treaty providing for the appointment of commissions to ascertain and mark the line from the source of the St Croix to the Lake of the Woods, and to decide upon the claims of Great Britain and the United States to Grand Manan and the Passamaquoddy Bay islands.

Article V provided that

> Whereas neither that point of the Highlands lying due North from the source of the River St Croix, and designated in the former Treaty of Peace between the 2 Powers, as the North-West Angle of Nova Scotia, nor the North-Westernmost head of Connecticut River, has yet been ascertained: and whereas, that part of the Boundary Line between the Dominions of the 2 Powers, which extends from the source of the River St Croix, directly North to the above-mentioned North-West Angle of Nova Scotia, thence along the said Highlands which divide those Rivers that empty themselves into the River St Lawrence from those which fall into the Atlantic Ocean, to the North-Westernmost head of Connecticut River, thence down along the middle of that River to the 45th degree of North Latitude; thence by a Line due west on said Latitude, until it strikes the river Iroquois or Cataraquy, which has not yet been surveyed; it is agreed that, for these several purposes 2 Commissioners shall be appointed, sworn and authorized to act exactly in the manner directed with respect to those mentioned in the next preceding article [respecting Passamaquoddy Bay islands] unless otherwise specified in the present article.

The treaty further empowered the commissioners to cause the boundary from the source of the St Croix to the St Lawrence to be surveyed and marked. It also provided for the preparation of a map of the boundary which should

be considered as 'finally and conclusively fixing the said Boundary' and for a reference to a 'Friendly Sovereign or State' if the two commissioners differed.

Under the provisions of Article v, Thomas Barclay, who had already served on the St Croix Commission, was appointed on the part of Great Britain. Cornelius P. Van Ness, a citizen of Vermont, was appointed commissioner on the part of the United States. As Barclay was also a member of the Passamaquoddy Islands Commission, it was arranged to hold the initial meetings of the two commissions at the same time. Their first meeting was held at St Andrews, N.B., on September 23, 1816. Ward Chipman appeared as agent on the part of Great Britain. The same objection was taken to his commission under Article v as to his commission under Article iv —the Passamaquoddy Islands Commission—and the difficulty was solved in the same way.

On June 4, 1817, the commission reconvened at Boston, and William C. Bradley presented his commission as agent on the part of the United States. Two parties of surveyors were instructed to commence operations. One, under Colonel Joseph Bouchette, surveyor-general of Quebec, was instructed to make a reconnaissance of the country along the due north line from the source of the St Croix to ascertain whether it intersected the highlands of the treaty of 1783. The other, under John Johnson, as chief surveyor for the United States, was to survey the due north line with a fair amount of accuracy, measured by the standards of that time.

On May 24, 1821, the commission met at New York to hear the arguments of the agents. Various meetings were also held in June, August, September and October, and on October 4 were brought to a close. As the commissioners had failed to agree, they adjourned till the following year to prepare their respective reports for reference to a 'Friendly Sovereign or State' as provided by the treaty. Moore says that when the board reconvened on August 1, 'the controversy as to procedure was renewed, with many criminations and recriminations as to the responsibility for the delays that had supervened in the execution of the work

of the commission,' and that the arguments were 'characterized by not a little acrimony.'

The British agent claimed Mars Hill, forty miles north of the source of the St Croix, as the north-west angle of Nova Scotia. The surveys of the due north line showed that it was the first mountainous elevation intersected; that the St John River was crossed at the 77th mile; that the water-parting between the St John and the Restigouche —a river flowing to *Chaleur Bay*—was intersected at the 97th mile, and that the watershed between the Metis and Restigouche—the water-parting between the St Lawrence and Chaleur Bay—was intersected at the 143rd mile. Between the 97th and 143rd miles, therefore, the line was in a basin draining to Chaleur Bay, and, unless the Gulf of St Lawrence was considered part of the Atlantic, it nowhere intersected the water-parting that 'divides those rivers that empty themselves into the River St Lawrence, from those which fall into the Atlantic Ocean.' He further claimed that the water-parting between the Metis and Restigouche did not possess the elevation or continuity characteristic of all 'highlands,' whereas the Mars Hill line did. That the latter did not itself divide St Lawrence waters from Atlantic waters, but, in part of its course, divided minor tributaries of the St John, and, in the remainder, to the source of the Chaudière River, divided the St John from the Penobscot and Kennebec would seem to require explanation. But the British agent anticipated objections on this score by arguing that the treaty should be interpreted according to its spirit and not its letter. He said that the words 'north to the highlands' are 'evidently to be understood as intending that the North line should terminate whenever it reached the highlands, which, *in any part of their extent*, divide the waters mentioned in the treaty,'[1] and that they need not divide the waters 'in their whole extent.' He proposed to reverse the language of the treaty and trace the line 'from the north-westernmost head of the Connecticut River, *along the highlands* which divide those rivers,

[1] Gallatin, *The Right of the United States to the North-eastern Boundary claimed by Them*, p. 23.

etc., to the North-west Angle of Nova Scotia, viz., that angle which is formed by a line drawn due north from the source of St Croix River to the Highlands.' This suggested line followed the southern watershed of the St Lawrence to Metjermette Portage at the head of the Penobscot, and for that distance coincided with the line claimed by the United States. From Metjermette Portage it ran eastward along the southern watershed of the St John and of the Des Chutes, a tributary of the former. The British agent contended that this line was to be followed because it was absolutely essential that it should follow highlands, whether they divided rivers mentioned in the treaty or not ; also, that the elevations on this line were a *continuation of the highlands* which, from the Connecticut to Metjermette Portage, were acknowledged by both parties to fulfil all the conditions of the treaty.

To support his contention that the treaty assigned to each nation the sources of the rivers emptying through its own territories, the British agent quoted the boundaries claimed by Congress in 1779. They claimed the St John from its ' source to its mouth ' as the eastern boundary and, practically, identified the source of the St John with the north-west angle of Nova Scotia. He argued that, having forced the Americans to recede from the St John, it was inconceivable that Great Britain would concede the upper portion of its valley.

He also claimed that the disputed territory had been occupied and jurisdiction had been exercised by Great Britain since 1763, and by France, her predecessor in title, for many years prior to that date.

The agent for the United States claimed, as the north-west angle of Nova Scotia, the intersection of the due north line with the water-parting between the St Lawrence and the Restigouche. His claim was based upon the recognition of this water-parting, for many years, as the boundary between Quebec and Nova Scotia ; that it was so indicated in all maps and records from the cession of Canada in 1763, till the treaty of peace in 1783, and later ; that, in 1797, the British agent, when making his argument before the St Croix Commission, had admitted the correctness of the

United States claim, and that it had been admitted by British officials and other authorities. He contended that the term 'highlands,' being connected with the words 'which divide the rivers,' etc., affixed to the expression a definite and precise meaning; that, as the ground dividing rivers is necessarily more elevated than those rivers and their banks, it is properly designated 'highlands' in relation to those rivers, and that the reports of the surveyors showed that the country was sufficiently rugged to fulfil the conditions claimed by Great Britain as necessary to constitute 'highlands.' In reply to the British contention that the line did not divide the waters flowing into the St Lawrence from those falling into the Atlantic, he argued that it was only necessary that it separate one class of waters, viz., those falling into the St Lawrence, from another class, viz., all other waters, and that, therefore, it fulfilled this condition; and that the British contention was unimportant, as Mitchell's map showed the Restigouche lying altogether to the east of the due north line, and the intent of the negotiators was apparent.

For the 'north-westernmost head of the Connecticut River' the British agent claimed Indian Stream, while the United States agent claimed Hall Stream.

From the Connecticut River, the line followed the 45th parallel to the St Lawrence. As this line had been surveyed by Valentine and Collins prior to 1774, and as the western terminus had been verified by Andrew Ellicott in 1817, no suspicion was entertained that it had not been correctly surveyed. In 1818 Dr Tiarks and F. R. Hassler, the British and American astronomers, discovered that, at Rouses Point, on the west shore of Lake Champlain, the 'old line' was 4200 feet north of the parallel, thus throwing the Rouses Point fort, constructed at a cost of $1,000,000, and another fortification into British territory. When the line was surveyed and marked under the provisions of the Ashburton Treaty, it was found to be, in places, one and a quarter mile north of its true position, and south of Huntingdon, Quebec, to be six-tenths of a mile south of the parallel. Fearing a local uprising, the astronomers, at first,

disclosed it only to the agents. The United States agent proposed to claim that the line be determined by *geocentric* latitude instead of *observed* latitude, which would have thrown the parallel thirteen miles north of the true latitude. This preposterous proposition, however, was not sustained by the commissioner for the United States.

The commissioners held their final session at New York, April 13, 1822. They filed their disagreeing opinions which had been exchanged at New York on October 4 in the preceding year, and presented their respective reports, which were transmitted to the contracting governments.

The British commissioner stated that, in his opinion, (*a*) Mars Hill was the north-west angle of Nova Scotia; (*b*) that the north-westernmost stream which emptied into the third lake of Connecticut River was the north-westernmost head of the Connecticut; (*c*) that, west of the Connecticut River, the boundary should follow the 45th parallel, which should be surveyed 'according to ordinary geographical principles.'

The United States commissioner was of the opinion (*a*) that the north-west angle of Nova Scotia was one hundred and forty-three miles north of the St Croix, in the water-parting between the St Lawrence and Restigouche waters; (*b*) that the head of the west branch of Indian Stream was the source of the Connecticut; (*c*) that it was not necessary to report any opinion respecting the '45th parallel' line.

Arbitration by the King of the Netherlands

Article v of the Treaty of Ghent provided that in the event of the commissioners differing, a reference should be made 'to a Friendly Sovereign or State,' but there was no provision respecting the procedure, limitation of time for making the reference, etc. With the government of New Brunswick and the government of Maine both claiming jurisdiction in the disputed area, the material for a conflict was ready, only requiring the match to be applied by some trivial dispute.

In 1825 trouble arose respecting licences to cut timber in

the disputed territory. Great Britain claimed that, while no encroachments on acknowledged United States territory would be permitted, the British settlements on the St John and Madawaska Rivers had been granted by the crown thirty years before, and had been unprotested for twenty years. Pending a settlement, it was agreed, in 1827, 'that no exercise of exclusive jurisdiction by either party, while the negotiation was pending, should change the state of the question of right to be definitively settled.' In the same year one John Baker was arrested by the authorities of New Brunswick. The United States demanded his release, and 'a full indemnity for the injuries which he has suffered.' A protest was made 'against any exercise of acts of exclusive jurisdiction by the British authority' in the disputed territory. The British government replied that Baker had stopped the mail from Canada, hoisted the American flag, and had formed a combination 'to transfer the territory in which he resided to the United States.'

In 1826 the United States, through Albert Gallatin, United States minister at London, opened negotiations with a view to settling differences between the two nations. On September 29, 1827, a treaty was signed by Charles Grant and Henry U. Addington, on behalf of Great Britain, and by Albert Gallatin, on the part of the United States. It provided that the contracting powers should proceed in concert to the choice of a friendly sovereign or state as arbitrator, and endeavour to obtain a decision within two years; that new statements of case should be prepared for submission to the arbitrator and mutually communicated to each other, each party to be at liberty to draw up a counter-statement; that Mitchell's map and map 'A'—which had been agreed on as a delineation of the water-courses—were the only maps to be considered as evidence, mutually acknowledged, of the topography, though either party was to be at liberty to annex other maps to its first statement, for purposes of illustration; all statements, etc., to be delivered in to the arbiter within two years after the exchange of ratifications, unless he had not, within that time, consented to act; in which case they were to be laid before him within six months after he con-

sented to act; that the arbiter could ask for further evidence and for additional surveys. Article VII provided that the decision of the arbiter should be final and conclusive, and should be 'carried without reserve, into immediate effect by Commissioners appointed for that purpose by the contracting parties.'

The convention was ratified at London on April 2, 1828. For arbitrator, the contracting parties agreed on the king of the Netherlands.

The case for Great Britain was apparently prepared by William Huskisson and Henry U. Addington, assisted by Ward Chipman, Jr. The statement for the United States was prepared by Albert Gallatin and William Preble. As might be expected from the ability of those engaged in their preparation, and as they represented the results of investigations extending over fifteen years, the statements were masterly presentations of the respective cases.

Before discussing the statements of case, it is necessary to review the acts of state, etc., that affect the title to the disputed area. To do so we must retrace our steps to the Alexander grant.

As already stated, James I granted Nova Scotia to Sir William Alexander, September 10, 1621. The grant was bounded on the west by the River St Croix from the Bay of Fundy to the remotest source of its western branch, thence by an imaginary straight line which extended through the land or ran northward to the nearest tributary of the St Lawrence, thence easterly along the south shore of the St Lawrence to Gaspe, etc.

On April 3, 1639, Charles I made a grant to Sir Ferdinando Gorges, which virtually confirmed a patent given to him in 1622 by the Plymouth Company. It included the territory between Piscataqua River on the west and Sagadahock[1] River on the east, and extended one hundred and twenty miles northward. This grant was transferred to the Massachusetts Bay Company, March 13, 1677.

On March 12, 1664, Charles II granted to James, Duke of York, the area commonly designated on old maps—including

[1] The Kennebec River below the Androscoggin.

Mitchell's map—Sagadahock. It extended from the St Croix westward to the Pemaquid and from the sea-coast to the St Lawrence. As, by the Treaty of Breda, Acadia or Nova Scotia had been restored to France, the grant was confirmed by Charles II, June 29, 1667. On the Duke of York's accession as James II it was merged in the crown.

On October 7, 1691, William and Mary granted the charter of the Province of Massachusetts Bay. It included 'The Colony of Massachusetts Bay and Colony of New Plymouth, the Province of Main, The Territory called Accadia or Nova Scotia,' and the tract of land between Nova Scotia and Maine. By the Treaty of Ryswick, September 10, 1697, Nova Scotia was again restored to France.

By the Treaty of Utrecht, March 31, 1713, Nova Scotia was retroceded to Great Britain, but was not re-annexed to Massachusetts Bay, being erected into a separate province. In the commissions to its third governor, Richard Philipps, issued September 11, 1719, and other governors down to 1761, it is described as the province of Nova Scotia or Acadie in America.

By the Treaty of Paris, February 10, 1763, Nova Scotia, Cape Breton and Canada were ceded to Great Britain.

The royal proclamation, October 7, 1763, described the new Province of Quebec as bounded on the south by a line drawn from the south end of Lake Nipissing; 'from whence the said line, crossing the River St Lawrence and the Lake Champlain in forty-five degrees north latitude, passes along the high lands which divide the Rivers that empty themselves into the said River St Lawrence from those which fall into the Sea; and also along the North Coast of the *Baye de Chaleurs*, and the coast of the Gulph of St Lawrence to Cape Rosiers.' The Quebec Act, 1774, defined the enlarged province as 'bounded on the south by a line from the Bay of Chaleurs, along the high lands which divide the rivers that empty themselves into the River St Lawrence from those which fall into the Sea, to a point in forty-five degrees of northern latitude, on the eastern bank of the River Connecticut, keeping the same latitude directly west,' etc. These were,

of course, the boundaries of Quebec at the date of the treaty of peace, 1783.

As already stated, the commissions of governors of Nova Scotia did not, prior to 1763, define the boundaries of their government, the lack of definition being due to the differences between France and Great Britain respecting the limits of Acadia or Nova Scotia. On November 21, 1763, six weeks after the proclamation, a commission was issued to Montagu Wilmot as governor of Nova Scotia. It defines the bounds of his government, in part, as follows:

> And to the westward, although our said Province hath anciently extended, and doth of right extend, as far as the River Pentagoet or Penobscot, It shall be bounded by a line drawn from Cape Sable across the entrance of the Bay of Fundy to the mouth of the River St Croix; by the said river to its source, and by a Line drawn due North, from thence to the Southern Boundary of our colony of Quebec.

The foregoing includes the principal acts of state, prior to the initiation of negotiations for the peace between Great Britain and the United States, that affect the disputed area.

On August 14, 1779, the Congress of the Confederated States defined, as a basis of peace, the boundaries claimed by them. They are defined as follows:

> These States are bounded north, by a line to be drawn from the north-west angle of Nova Scotia along the highlands which divide those rivers which empty themselves into the river St Lawrence, from those which fall into the Atlantick Ocean, to the north-westernmost head of Connecticut River; thence down along the middle of that river to the forty-fifth degree of north latitude; thence due west in the latitude forty-five degrees north from the equator to the north-westernmost side of the River St Lawrence, or Cadaraqui; thence straight to the south end of Nepissing; and thence straight to the source of the river Mississippi: west, by a line to be drawn along the middle of the River Mississippi from its source . . . and east, by a line to be drawn along the middle of St John's River from its source to its mouth in the Bay of Fundy, comprehending all islands within twenty

> leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other part, shall respectively touch the Bay of Fundy and Atlantick Ocean . . . If the line to be drawn from the mouth of the Lake Nepissing to the head of the Mississippi cannot be obtained without continuing the war for that purpose, you are hereby empowered to agree to some other line between that point and the river Mississippi; provided the same shall in no part thereof be to the southward of latitude forty-five degrees north. And in like manner, if the eastern boundary above described cannot be obtained, you are hereby empowered to agree, that the same shall be afterwards adjusted, by Commissioners to be duly appointed for that purpose.

It will be noted that:

1. The description of the 'highlands' of the northern boundary is the same as in the proclamation of 1763 and in the Quebec Act, except that 'Atlantick Ocean' is substituted for 'Sea,' doubtless to make the description more specific. This identity proves that, in drafting the instructions, this portion was copied from the Quebec Act.

2. For the first time the term 'north-west angle of Nova Scotia' is used and defined. As this was the initial point of the northern boundary, it is obvious that it must be the intersection of the eastern and northern limits, and that the descriptions of these limits should define its position. Arguing on this basis, it is evident that Congress, in 1779, placed it in the highlands at the head of the St John. Moore argues that it is the branch[1] shown on Mitchell's map as heading in Lake Medousa,[2] but this is inadmissible. This theory was also advanced by Gallatin, who says, 'If the source of the St John, designated in Mitchell's Map by the name of Nepissigouche[3] was, *as it is believed*, the source intended by Congress and by the American negotiators, the River St John from its source to its mouth, would have been with great propriety

[1] Madawaska river of modern maps.
[2] Temiscouata Lake of modern maps.
[3] A lake near the head of Temiscouata Lake.

described as the eastern boundary of the United States.' To the lack of any evidence whatsoever that Mitchell's map was used by Congress, there is the additional fact that the theory presupposes the committee of Congress that drafted the description to have been composed of men of unusual and extraordinary stupidity. Finally, on Mitchell's and other authoritative maps, while this branch is not designated St John river, the *main stream above its confluence is so designated.* While the wording of the description is absolutely in accordance with the British contention, it is only necessary to examine the matter, bearing in mind the circumstances connected with the drafting of it. A critical examination shows that, so far as this portion of the boundary was concerned, Congress was claiming up to the limits of Nova Scotia and Quebec as fixed in 1763. The intersection of the western boundary of Nova Scotia and the southern boundary of Quebec was taken as the initial point, and the description of the southern boundary of Quebec was inserted ; the western and southern boundaries were then drafted. On the east, the plenipotentiary was to demand the St John, but if it 'cannot be obtained' he was empowered to agree to the appointment of commissioners who should determine the boundary, the awarded line to follow the boundary between Massachusetts Bay and Nova Scotia. In short, he was to claim to the St John ; if this was not obtainable, they were to accept the St Croix. In proposing to carry the boundary to the St John, they overlooked the defect thus created. It must also be borne in mind that, at that date, the unsettled wilderness of the interior appeared almost valueless compared with the sea-coast. Again, had they claimed the St John to the due north line and thence northward, they would have stultified themselves by acknowledging the baselessness of their claim to the more easterly river.

(*a*) So far as the writer is aware, this is the first time that the term 'north-west angle of Nova Scotia' was used in any official document. As indicated above, it is unintentionally placed at the head of the St John, instead of at the northern extremity of the due north line from the source of the St Croix.

(*b*) The error of defining the boundary-line from the mouth of the St Croix as running 'due east' instead of 'due south' also originated in this document. This error has been discussed in connection with the Passamaquoddy islands.[1]

(*c*) Between the St Lawrence and Lake Nipissing, the commissioner was to demand the southern boundary of Quebec as defined in the Proclamation of 1763, and thence due west. If this was unobtainable, he was empowered to accept the 45th parallel—the prolongation westward of the northern boundary of New York State.

These instructions have been discussed at length, as, in 1782, they formed the basis of the demands of the American negotiators. The instructions demanded the St John, although a special committee of Congress had, on August 16 of that year, reported that the territory designated Sagadahock 'cannot be proved to extend to the River St John as clearly as that of the St Croix.'

During the summer of 1782, negotiations for a treaty of peace were carried on by Richard Oswald on the part of Great Britain, and Benjamin Franklin and John Jay on behalf of the United States. Later, John Adams joined them as an additional American negotiator. Oswald[2] assented to the demand for the St John River, and the line from the St Lawrence to Lake Nipissing and thence west to the Mississippi. The British government refused to approve these boundaries, and, eventually, the eastern boundary was settled as described in the treaty of peace.[3] On the north, the Americans offered to accept either the 45th parallel or a line up the St Lawrence, through the Great Lakes, up 'Long Lake and River' to Lake of the Woods and due west to the Mississippi. The latter line was adopted, and the preliminary treaty of peace was signed on

[1] *Supra*, p. 768.

[2] Oswald was described by Franklin as a 'pacifical man.' Fitzmaurice, the biographer of Lord Shelburne, says, 'Nobody could in any case have been more unfit both by character and habits for engaging in a diplomatic intrigue than Oswald, whose simplicity of mind and straightforwardness of character, struck all who knew him' (*Life of William, Earl of Shelburne*, iii. p. 185).

[3] *Supra*, p. 752.

November 30, 1782. The same article was included in the definitive treaty, September 3, 1783.

In 1784 New Brunswick was erected into a separate province. In the commission of its first governor, Thomas Carleton, August 16, 1784, it is described as bounded on the west by the St Croix and the due north line, and, on the north, by the southern boundary of Quebec.

The foregoing is a brief review of the principal acts of state, etc., prior to the submission to the arbitrator, the king of the Netherlands. The principal grounds of claim put forward by the contending parties will be now stated, with comments.

The 'Statements'[1] dealt with the subject under three general heads, viz.:

(1) North-west angle of Nova Scotia and the Highlands.

(2) North-westernmost head of Connecticut River.

(3) The line along the 45th parallel from the Connecticut to 'the River Iroquois or Cataraquy'—the St Lawrence.

The British Statement

North-west Angle of Nova Scotia.—Great Britain contended that Mars Hill, the first considerable elevation encountered on the due north line from the source of the St Croix, and forty miles distant therefrom, was the north-west angle of Nova Scotia; 'that the highlands intended by the treaty are those extending from that point to the Connecticut River; and that the Rivers Penobscot, Kennebec, and Androscoggin are the rivers falling into the Atlantic Ocean which are intended by the treaty to be divided from the rivers which empty themselves into the River St Lawrence';[2] that the highlands claimed by the United States divided, near the due north line, waters falling into the River St Lawrence from those falling into the *Gulf of St Lawrence*, and, farther west, waters falling into the St

[1] 'These statements, which were printed, but not published, were bound up in a volume of which there are only a few copies in existence' (Moore, *Treaties and Arbitrations*, i. p. 91).

[2] 'First Statements on the part of Great Britain' (Moore, *Treaties and Arbitrations*, i. p. 107).

Lawrence from those flowing through the St John River into the *Bay of Fundy*, while the 'highlands' of the treaty divided waters flowing into the St Lawrence from those falling into the *Atlantic Ocean*. According to the British statement, this was 'the cardinal point of the whole of this branch of difference,' inasmuch as the treaty contra-distinguished the Bay of Fundy from the Atlantic Ocean. Thus, the St Croix was defined as the extreme eastern limit of the United States, and the highlands were those that divided, on the south, rivers that fell into the Atlantic between the Connecticut and the said eastern limit—the St Croix. Further ground for this argument was obtained from the negotiations for the treaty of peace. The Americans first demanded the St John. When this was refused by Great Britain they accepted the St Croix; consequently the new, and contracted, line must have lain within the line of that river. Therefore, at no point east of the source of the St John did the highlands claimed by the United States meet the requirements of the treaty.

Further support was obtained from the grant of the seigniory of Madawaska. In 1683, eight years prior to the charter of Massachusetts Bay, this fief was granted by the then governor of New France (Canada). From the date of the grant till 1763, when Canada was ceded to Great Britain, it was under the jurisdiction of New France. Since 1760 the British government had been in undisturbed possession. Along the St John River, between the due north line and the mouth of the St Francis, there was a fringe of settlements on each bank of the river. This, usually referred to as the Madawaska settlement, and which should not be confounded with the Madawaska seigniory, was settled by Acadians, who had originally occupied territory near the site of the present city of Fredericton, N.B. When the British extended their settlements up the St John, these Acadians removed to the St John near the confluence of the Madawaska. Grants of land had been made to them, and jurisdiction exercised by the Province of New Brunswick since 1783. The territory was traversed by a road, the main highway from the Maritime Provinces to Quebec.

Though comparatively modern, the settlement was, unquestionably, a *de facto* possession of Great Britain. Prior to 1820 no mention was made of it in the United States census, and even then it was stated that the inhabitants 'supposed they were in Canada.'

The Highlands. — Great Britain contended that the term 'highlands' employed in the treaty implied not a mere watershed, but a mountainous tract of country; that, while not necessary that they should present an absolutely unbroken ridge, they should have a generally elevated and mountainous character; that the highlands from Mars Hill westward conformed to this definition, and that not one-third of the United States line followed country entitled to the appellation of highlands.

In brief Great Britain contended:

(1) That in the treaty of 1783 the Bay of Fundy was contra-distinguished from the Atlantic Ocean; that the St John River was therefore not to be included in the rivers 'which fall into the Atlantic Ocean'; and that, consequently, the highlands must lie to the southward of that river.

(2) That in 1782, plenipotentiaries for the United States claimed the St John River from the mouth to the source as the eastern boundary of Massachusetts Bay; that, later, they agreed to a material contraction of this line.

(3) That within the territory claimed by the United States, France, and Great Britain as the successor in title to France, had exercised jurisdiction since 1683.

(4) That from the treaty of peace in 1783 to the Treaty of Ghent, 1814, Great Britain had exercised continuous and unchallenged jurisdiction in the Madawaska, Aroostook and other settlements in the disputed territory.

(5) That the line claimed by Great Britain followed 'highlands' that conformed to the requirements of the treaty, and that the highlands claimed by the United States did not so conform, either in position or in character.

'*North-westernmost Head of Connecticut River.*'—Great Britain claimed that this point was to be found in the most north-westerly spring measuring from the highest point on the river bearing the name 'Connecticut.' Near the 45th

parallel, two considerable branches, known as Hall Stream and Indian River, fall into the Connecticut. The latter, however, retains its name up to an expansion known as Connecticut Lake. The British statement, therefore, contended that the most north-westerly spring in the drainage area above Connecticut Lake was the desired point. The statement also pointed out that, while the American agent, under Article v of the Treaty of Ghent, had contended for Hall Stream, the American commissioner had claimed Indian River. The government of the United States had adopted the claim for Hall Stream, and had also claimed the 'old line' for the 45th parallel. Inasmuch as the 'old line' intersected Hall Stream *above* its junction with the Connecticut River, this boundary could never strike the real Connecticut river at all.

'*Forty-fifth Degree of North Latitude.*'—By the treaty of 1783, the boundary followed due west on the 'forty-fifth degree of north latitude' till it intersected the St Lawrence. The surveys of 1818 showed that the 'Valentine and Collins' or 'Old' line was, in places, in error; and that at Rouses Point the fortifications erected by the United States were on British territory. The British statement claimed that the treaty required that the line should follow the 45th parallel of north latitude as determined by accurate methods of survey.

Statement on the Part of the United States

The statement of the United States dealt with the subject under the same heads as the British statement.

The '*Highlands.*'—Respecting the highlands, it was declared that they constituted the fundamental point. The term 'highlands' was never used in the treaty, except when connected with the words 'which divide the rivers,' and, therefore, this property of dividing designated rivers affixed to the term a definite and precise meaning; united with that adjunct, the word was judiciously selected, as it was applicable to any lands sufficiently elevated to form a watershed. The term 'highlands which divide rivers'

and 'height of land' were synonymous. Even so late as 1817 the character of the country was unknown, and the United States line was still only partially examined. The elevated or mountainous character of either line was unimportant and irrelevant to the questions at issue.

North-west Angle of Nova Scotia.—The United States statement claimed that there were only two places on the 'due north' line which divided rivers recognized by the treaty. About ninety-seven miles from the source of the St Croix, the line reached a ridge or 'highland' which divided waters that fell into the St John from waters that flowed through the Restigouche into the Gulf of St Lawrence. At about one hundred and forty-three miles from the source of the St Croix, it reached the 'highlands' that divide the waters of the Restigouche from the waters of the Metis, a tributary of the St Lawrence. There was no possible choice except between those two places. Since there is no other point on the due north line which divides any other waters but such as empty themselves into the same river, the north-west angle must, of necessity, be found at one or the other.

The American statement argued that the selection between these two dividing 'highlands' depended upon what the negotiators of 1783 meant by rivers that fall into the St Lawrence, and by rivers that fall into the Atlantic. The treaty recognized only two classes of rivers. The first class included only tributaries of a river specifically designated, thus explicitly excluding any other rivers. All other streams intersected by the line were considered as falling into the Atlantic Ocean. This conclusion perfectly accorded with the accepted meaning of the term 'Atlantic Ocean.' In its general sense it embraced all the bays, gulfs and inlets, though distinguished by different names, which were formed by the shores of Europe and North America. In the case under consideration, every river, not emptying itself into the St Lawrence, and intended to be divided which was, or could have been, contemplated by the negotiators of 1783 as falling into the Atlantic, fell into it through some gulf or bay, known and, in Mitchell's map, specifically designated; that

is to say: the Restigouche through Chaleur Bay and Gulf of St Lawrence, the St John through the Bay of Fundy, the St Croix through Passamaquoddy Bay and Bay of Fundy, etc. So that if the rivers which fell into the Atlantic through a bay, gulf or inlet known by a distinct name, were not, under the treaty of 1783, rivers falling into the Atlantic Ocean, there was not a single river intended to be divided to which the description applied. The north-west angle was, therefore, at the point where the due north line intersected the watershed between the Restigouche and Metis.

From 1763 to 1782 the northern boundary of Nova Scotia, as defined in commissions to the governors of that province, coincided with the southern boundary of Quebec to the 'western extremity of the Bay des Chaleurs.' From 1763 to 1774, in the commissions to governors of Quebec, the southern boundary of that province was described, in conformity with the proclamation of 1763, as a line which 'passes along the highlands which divide the rivers that empty themselves into the said River St Lawrence from those which fall into the sea, and also along the north coast of the Bay des Chaleurs.' The 'highlands' of the treaty were identical with the 'highlands' of the proclamation of 1763 and of the Quebec Act, 1774, and the term 'Atlantic Ocean,' as used in that clause of the treaty, was synonymous with the word 'Sea' as used in previous acts of the British government.

Nineteen maps, published between 1763 and 1783, were annexed to the United States statement. In some the Penobscot was indicated as the western boundary; in others, where the St Croix was indicated as the boundary, the name was sometimes applied to the present Cobscook, to the Magaguadavic and to the Schoodic. The course of the line from the source of the St Croix was generally due north. The line, in most of the maps, crossed no other waters but the St John and its tributaries; in others, it crossed the Restigouche.

> But, in every instance . . . that line crosses the River St John and terminates at the Highlands in which the rivers that fall into the River St Lawrence have their sources; in every instance, the north-west angle of

> Nova Scotia is laid down on those Highlands and where the north line terminates ; in every instance, the Highlands, from that point to the Connecticut River, divide the rivers that fall into the River St Lawrence, from the tributary streams of the River St John, and from the other rivers that fall into the Atlantic Ocean.[1]

Four maps published in London during the interval between the signing of the preliminary treaty, November 1782, and of the definitive treaty, September 1783, showed the same lines.

Respecting the line from Mars Hill, the United States statement said : that so far from being a highland which divided St Lawrence waters from Atlantic waters, it was one hundred miles distant from any tributaries of the St Lawrence and, from Mars Hill to the nearest source of the Penobscot, it only divided two minor tributaries of the St John ; that no highlands extended eastward from it to form the northern boundary of Nova Scotia ; that, for one hundred and fifteen miles in a straight line—from Mars Hill to Metjermette Portage—it nowhere divided waters falling into the St Lawrence, and that only for some eighty miles, between Metjermette Portage and the Connecticut, did it follow the highlands of the treaty.

North-westernmost Head of Connecticut River.—The United States statement alleged that the geography of the upper Connecticut was imperfectly known in 1783. Surveys under Article v of the Treaty of Ghent showed four branches with their sources in the highlands, viz., Hall, Indian, Perry and Main Connecticut. From its peculiar characteristic, the last branch might be called Lake Stream. In 1783, the river formed by the junction of Indian and Perry and Lake Streams was known as the Connecticut River. The mouth of Hall Stream was about two miles below this junction. It was a quarter of a mile *south* of the ' old line,' but half a mile *north* of the 45th parallel, as determined by later and more accurate observations. The source of the middle branch of Hall Stream was the north-westernmost head of the branches

[1] Gallatin, *Right of the United States to the North-eastern Boundary claimed by Them*, p. 78.

above-mentioned, and it had accordingly been claimed by the United States as the north-westernmost head of the Connecticut. On the other hand, the United States commissioner, under Article v of the Treaty of Ghent, had conceded that the boundary-line, where it met the 45th parallel, must be in the middle of the stream, which was, prior to the treaty of 1783, recognized as the main Connecticut River. It had been shown that this argument was not conclusive, but, should it prevail, the source of Indian Stream must be considered the north-westernmost head of Connecticut River contemplated by the treaty.

Forty-fifth Parallel of North Latitude. — Respecting the boundary between the Connecticut River and the St Lawrence, the United States statement said that by an order-in-council of July 20, 1764, the Connecticut River, between the 45th parallel and the northern boundary of Massachusetts Bay, was declared to be the boundary between New York and New Hampshire. On August 12, 1768, this parallel was confirmed as the boundary between New York and Quebec. It had been surveyed between 1771 and 1774. It had ever since been the basis of jurisdiction and grants of land, and in 1783 it was established and in full force. Though the Treaty of Ghent declared that the boundary between the St Croix and the St Lawrence 'had not yet been surveyed,' it was submitted whether it was not the true intention of that treaty that the boundary should be surveyed only where not already run, and marked, and whether the 'old line' was not excepted from the provision directing the survey of the boundary.

Second British Statement

The second or definitive British statement, in the main, presented a supplementary view of the British case.

In order to determine the true situation of the point of departure, said the second British statement, the highlands intended by the treaty must first be determined. Since in 1783 a large part of the frontier territory was practically unexplored, it was impossible for the negotiators of the treaty to

describe the boundary with accuracy and precision, but it was not impossible to show their intent. They intended (1) to define exclusively the limits of the United States; (2) to define them peremptorily; (3) to define them in such a manner as to promote the 'reciprocal advantage and mutual convenience' of both countries. Such being the animating motives, it was inconceivable that the British government could have intended to carry the boundary-line north of the St John, thus losing not only a considerable area, but surrendering the direct communication between Nova Scotia and Canada. With respect to the question of highlands, it sufficed to quote, as to Mars Hill, the statement of the American surveyor that it was 'about 1000 feet above the general level.' The question of the north-west angle was subordinate to that of the highlands, and its position was unknown in 1783. According to the United States, the charter of Massachusetts Bay would place it on the right bank of the St Lawrence, and the proclamation of 1763 and the Quebec Act would place it, in certain highlands, south of the St Lawrence, while the proposal of the United States negotiators of 1782 fixed it at the source of the St John.

So far as ancient provincial boundaries were concerned, said the second British statement, the United States had laboured to prove the identity of the due north line from the St Croix to the Metis River with the boundaries between the British provinces of Nova Scotia, Quebec and Massachusetts Bay, but this was a mere matter of conjecture. If the negotiators had intended to adopt an existing line, they might have defined it as a due north line from the St Croix to the southern boundary of Quebec. Instead of adhering to ancient boundaries, which might have prolonged the negotiations indefinitely, they adopted a new line.

Respecting the maps submitted by the United States, the second British statement contended (1) that these maps were grossly in error, inasmuch as they indicated a line of visible elevations, later found to be non-existent; (2) that, in some of them, the line of visible elevation intersected waters of the St John, or of the St Lawrence, or both, thus disproving any intention to indicate it as dividing those

waters ; (3) that the agreement provided that no maps but Mitchell's and map 'A' were to be received as *authority* ; (4) that maps were copied one from another, so that coincidence did not signify additional evidence ; and (5) that the selection by the negotiators of Mitchell's map, published prior to the proclamation of 1763, materially contributed to show that the line indicated on the later maps was not the intended boundary.

The second British statement laid great stress on the injury which would be occasioned to the British provinces by allowing the American claim.

Respecting the 45th parallel, the second British statement said that while the old line was considered accurate, in 1774 both governments had, prior to the Treaty of Ghent, received information impugning its accuracy. The United States had not made any objection to its rectification until it was discovered that it would be injurious to American interests, principally by the loss of the Rouses Point fortifications.

Second United States Statement

The second United States statement declared that the question at issue was whether the highlands of the treaty actually need not, as the British contention implied, for three-fifths of their extent divide the rivers that were specified. To support this extraordinary pretension, Great Britain had appealed from the letter of the treaty to what was improperly called its spirit. Even admitting that there was some foundation for her position in regard to the terms 'Atlantic Ocean' and 'highlands,' the line claimed by her would still fail to meet the requirements of the treaty.

The British statement had declared that, in 1782 and 1783, the position of the north-west angle of Nova Scotia was unknown, and that the negotiators had adopted boundaries intended to give each government possession of the basins of all rivers having their mouths within its territory. The second United States statement contended that there were, at the time of the treaty, certain and acknowledged boundaries between Canada and Nova Scotia, and it was supposed that

the ascertainment of the position of the 'north-west angle' was a mere operation of surveying. The alleged intention of the negotiators was disproved by the decisive fact that it was not adhered to with respect to any other part of the boundary; thus, along the 45th parallel, it intersected lakes and streams, leaving the upper waters in one country and the lower waters in the other. All the inconveniences with respect to navigation, or to a division, between the two powers, ascribed by Great Britain to the boundary, so far as it affected the St John, applied with greater force to the St Lawrence and its basin. And, on the principle she assumed, she might, with equal consistence and justice, have claimed all the territory on the south of the St Lawrence and Great Lakes.

The term 'Atlantic Ocean.'—As to the term 'Atlantic Ocean,' the second United States statement argued that the words 'rivers which fall into the Atlantic Ocean' necessarily embraced rivers falling into its inlets, the Bay of Fundy and the Gulf of St Lawrence, according to geographical usage, to common language and to official documents. The description of the St Croix, as having its mouth in the Bay of Fundy, had been taken from the grant to Sir William Alexander and the commissions to the governors of Nova Scotia, and various British documents were cited to prove that the term 'Atlantic Ocean' had been used so as to include Massachusetts Bay, Bay of Fundy, Gulf of St Lawrence and other bodies of water. As to the intent of the negotiators, it was contended that the original proposition of the American commissioners proved conclusively that, though the St John was stated to have its mouth in the Bay of Fundy, it was classed as one of the rivers falling into the Atlantic, inasmuch as the northern boundary divided St Lawrence waters from the rivers 'which fall into the Atlantic Ocean,' and the eastern boundary followed the St John from its mouth to its source.

The term 'Highlands.'—Respecting the term 'highlands,' the second United States statement contended that the name 'height of land' was not *peculiarly applicable* to the highlands between the Connecticut and Kennebec and the

St Lawrence; and that the only semblance of ground for the supposition was its use by Pownall; and Pownall, Mackenzie and others were cited to prove that 'lands height,' 'height of land,' 'height of the land' and 'highlands' were used synonymously.

The Madawaska Fief and Settlement.—Respecting the fief of Madawaska, the second United States statement denied that a grant by the governor of New France could affect the limits of Massachusetts Bay, and contended that neither England nor France, in its grants of land, paid the slightest respect to the claims or rights of the other. It maintained that no proofs had been adduced that the British purchasers of the fief had ever performed any of the conditions incumbent upon the holder under feudal tenure, or that acts of jurisdiction had been performed therein and that some obscure transactions had occurred, but that every one included not only the fief of Madawaska, but also other lands situated within the acknowledged boundaries of the British Province of Quebec, and that some of the deeds included Foucault seigniory, known to be situated *without* those boundaries.

Respecting the Madawaska settlement, the American definitive statement claimed that it was not evidence that New Brunswick, prior to the Treaty of Ghent, had exercised jurisdiction in this area. It was settled by Acadians who had moved there when British settlements were extended to the vicinity of their original settlement on the Lower St John. At that date the position of the due north line was unknown, and it was therefore not until the survey of 1817-18 that exercise of jurisdiction by New Brunswick was protested. The British agent under the Jay Treaty admitted that the due north line crossed the St John, but, later, as agent under Article v of the Treaty of Ghent, endeavoured to explain it away. No claim to the territory had been preferred by Great Britain until the Treaty of Ghent, when her commissioners proposed a 'revision of the boundary-line' which would 'secure a direct communication between Quebec and Halifax.'

Award of the King of the Netherlands

On January 10, 1831, the king of the Netherlands rendered his award. He decided that the term 'highlands' applied to land which, without being hilly, divided waters flowing in different directions; that the boundaries through the Great Lakes, as defined in the treaty of 1783, departed from the ancient provincial boundaries; that the Treaty of Ghent stipulated for a new examination, which could not be applicable to an historical or administrative boundary; that, therefore, the ancient delimitation of the British provinces did not, either, form the basis of a decision; that the arguments deduced from the rights of sovereignty exercised over the fief of Madawaska and over the Madawaska settlement could not decide the question, for the reason that those two settlements embraced only a portion of the territory in dispute; that neither the 'highlands' line claimed by Great Britain nor that claimed by the United States fulfilled the requirements of the treaty of 1783 respecting the division of the rivers; and that the evidence adduced on either side could not be considered as sufficiently preponderating to determine a preference in favour of either one of the two lines respectively claimed. He therefore recommended a line of convenience.

The arbitrator's line coincided with the present boundary from the source of the St Croix to the St Francis. It followed the latter to the source of its south-westernmost branch, thence due west to the southern watershed of the St Lawrence —the line claimed by the United States—thence following the United States line to the Metjermette Portage, where it united with the British line.

Respecting the north-westernmost head of the Connecticut River, he decided in favour of the British claim.

Respecting the 45th parallel line, he adopted the British contention, except that he recommended that the Rouses Point fortifications and a radius of one kilometre should remain in the possession of the United States.

Out of the total area of about 12,000 square miles, about

4100 square miles were awarded to Great Britain and 7900 to the United States. On January 12, 1831, Mr Preble, United States minister at The Hague, though without instructions, protested the award on the ground that the arbitrator had exceeded his powers. The question where the boundary should run, said Preble, if the treaty of 1783 could not be executed, was one which, he believed, the United States would submit to no sovereign. When the arbitrator proceeded to say that it would be suitable to draw an arbitrary compromise line, thus abandoning the boundaries of the treaty and substituting for them a different line, Preble said it became his duty to enter a protest, on the ground that this decision constituted a 'departure from the powers delegated by the High Interested Parties,' and that the rights and interests of the United States might not be compromised by any presumed acquiescence on the part of its minister.

The British government accepted the award, but notified the United States government that it was willing to consider modifications of the line for mutual convenience. The United States government hesitated. President Jackson was inclined to accept the award,[1] but, doubtless, owing to the opposition of Maine and Massachusetts, submitted it to the Senate. The Senate withheld their assent, and recommended 'the President to open a new negotiation . . . for ascertaining the true boundary.' The British government offered to avail themselves of any chance of bringing the dispute to a satisfactory settlement, but declined to connect with it the question of the navigation of the St John. Meanwhile the United States government endeavoured to arrange a settlement with Maine and Massachusetts. In return for a surrender of her claim to territory north of the St John, Maine was to be indemnified by lands in adjoining territory and in Michigan. The negotiations, however, came to naught.

On April 30, 1833, the Hon. E. Livingston, United States secretary of state, wrote the British minister at

[1] 'He afterwards regretted that he had not done so' (Moore, *Treaties and Arbitrations*, i. p. 138).

Washington, proposing 'a new commission, consisting of an equal number of commissioners, with an umpire selected by some friendly Sovereign . . . or by a commission entirely composed of such men [experts], so selected, to be attended in the survey and view of the country, by agents appointed by the parties.' He further proposed that, if the due north line would not reach the highlands of the treaty, 'then a direct line . . . whatever may be its direction to such highlands, ought to be adopted.' The British government feared that this might pledge them to drawing the line to the eastward, but Livingston explained that his proposed line 'would be carried to the left of the due north line, or westward . . . upon a supposition that at a point some fifty miles . . . westward' of the head of the St Francis River, highlands would be found that divided rivers falling into the St Lawrence from rivers falling into the Atlantic. The British government, however, had no hope of reaching a solution of the matter in this way. Sir C. R. Vaughan, in a dispatch to Lord Palmerston, June 4, 1833, pointed out that, as the negotiations with Maine in the previous year had come to naught, the constitutional difficulties still remained; that, when Livingston pointed out his imaginary line on the map, it might have been implied that 'it would result in a more advantageous boundary to Great Britain, than that offered by the due north line,' but that a later conversation with M^{c}Lane—Livingston's successor—with a better map before them, indicated an intention to direct the commission to explore in search of the highlands, thus, possibly, placing Great Britain in a worse position than by the arbitrator's award; that it was not probable 'the Americans will ever be brought to consent' to drawing the line to the sources of the Chaudière; that insurmountable constitutional difficulties 'restrict the President from treating for a boundary more satisfactory to both parties than the one suggested by the King of the Netherlands'; and that it was hopeless to entertain the offer to negotiate, 'restricted as the American government is, to an inadmissible basis.'

Further discussion demonstrated the impossibility of a settlement that would be even as favourable to the interests

of Great Britain as the decision of the king of the Netherlands. In October 1835 the British government declared that it was 'fully and entirely released' from its conditional offer to accept the award of the arbitrator, and proposed as the boundary the St John River from the due north line to its source. The President made a counter-proposal of the St John from its mouth to its source, provided Maine would consent. Mr Bankhead, British chargé at Washington, 'stated the impossibility, on the part of the British Government, of agreeing to such a proposition.'

These negotiations have been referred to in detail, because it has been popularly understood that, on this occasion, Great Britain lost an opportunity to secure a very favourable settlement. An examination of all the correspondence, however, demonstrates the fallacy of this impression. At no time was there any possibility of her securing even as favourable a settlement as the award of the king of the Netherlands. If the decision were more favourable to the United States than the award had been, the United States Senate *might* accept it; if less favourable, its rejection was certain. The Senate could not, and would not, coerce Maine, and Maine would not give the federal government any considerable latitude as a basis for a compromise.

President Jackson's endeavours to effect a settlement before the close of his administration were unsuccessful, and the thread of negotiations was taken up by his successor, President Van Buren. Another attempt was made to do what Great Britain had insisted was a necessary preliminary to negotiations, viz., induce Maine to concede the principle of a conventional line as a basis of settlement. The legislature of Maine, impracticable as ever, refused to assent to any concessions, and resolved that the United States should, either alone, or in conjunction with Great Britain, survey and mark the boundary-line.

In 1839 Featherstonhaugh and Mudge surveyed a part of the disputed area for the British government. In their report they took the ground that previous lines were erroneous, and proposed a new one. They followed the description of the western boundary of Nova Scotia as given in the grant to

Sir William Alexander. As already stated, this line followed the St Croix from its mouth to the source of its west branch, thence by a straight line to the nearest tributary of the St Lawrence. 'Such a course leads directly to the east branches of the Chaudière, which are in the 46th parallel of north latitude, and on the ancient confines of Acadia.' They said that the Green Mountains divided in latitude 44° N, the southern branch proceeding from the sources of the Connecticut river in an east-north-easterly direction to Chaleur Bay and passing south of the Aroostook, upper Tobique and Restigouche. This, they claimed, was the 'axis of maximum elevation' and constituted the 'true Highlands intended by the 2nd article of the treaty of 1783.' The line from the St Croix, however, intersected the 'highlands' line claimed by Great Britain *before* it reached the highlands dividing the waters of the River St Lawrence from those that 'fall into the Atlantic.'

In 1840-42 the United States expended $100,000 in surveys and explorations in the disputed territory. The report of their surveyors challenged the 'maximum axis of elevation' of Featherstonhaugh and Mudge. It was stated to be represented by eminences separated one from another by spaces of low country so extended as to preclude the idea of a continuous range of highlands.

Frontier Strife

While negotiations proceeded, the authorities of Maine and New Brunswick and settlers in the disputed area had clashed on several occasions. In 1831 certain persons who attempted to hold an election under the laws of Maine, in the Madawaska settlement, were arrested by the New Brunswick authorities. Though convicted, they were afterwards released, on disavowal of their acts by the Maine authorities. In 1836 a Canadian justice of the peace was arrested by New Hampshire militia for attempting to execute process in the Indian Stream territory. In 1837 an officer taking the census for Maine in the Madawaska settlement was arrested by New Brunswick authorities.

In 1838-39 the so-called 'Restook War' broke out. An agent sent by the State of Maine to arrest British subjects who were cutting timber in the Aroostook region was arrested by the authorities of New Brunswick. Maine raised an armed 'civil posse' and erected 'fortifications' in the territory.[1] The legislature of Maine appropriated $800,000 for military operations; Congress authorized the president to call out the militia and to accept 50,000 volunteers, and voted $10,000,000 for purposes of war. The president, however, dispatched General Scott to arrange a *modus vivendi* with the British authorities. It was agreed that Great Britain should remain in possession of one part of the territory and Maine in possession of the other, but that such possession should not derogate from the claims of the non-possessing party, and that the military forces of the State of Maine should be withdrawn. The British authorities carried out the agreement, but the State of Maine sent, under the pretence that it was a civil posse, an armed force of 300 men, who erected a blockhouse on the St John River.

In March 1841 Daniel Webster succeeded John Forsyth as United States secretary of state. He had from the first viewed the chances of a settlement as hopeless unless there was an entire change in the manner of proceeding. During the summer of 1841 he informed Fox, British minister at Washington, that the United States government was willing to compromise the dispute by agreeing to a conventional line. This offer was communicated to the British government, and Lord Ashburton was sent with full powers to settle all disputes between the two countries. Ashburton was a son of Sir Francis Baring, the founder of the noted banking firm, Baring Bros. and Co. He had always been friendly to the United States and had married a daughter of Bingham of Philadelphia.

Lord Ashburton arrived in Washington on April 4, 1842. In the preceding month the legislature of Massachusetts had adopted resolutions declaring that the boundary could be easily defined in accordance with the treaty of 1783, and that

[1] Webster wrote: 'There was Fort Fairfield, Fort Kent, and I know not what other fortresses, all memorable in history' (*Webster's Works*, v. 93).

no compromise could be made without the assent of Maine and Massachusetts. The legislature of Maine also adopted resolutions that did not form a hopeful basis for negotiations. In response to an invitation from Webster both states sent commissioners to represent them in the negotiations at Washington. On June 21 Lord Ashburton offered to accept as the boundary the St John River from the due north line to one of its sources, except that the line should be so drawn as to include the Madawaska settlements on the south bank of the St John. He offered to concede the strip between the 'old line' and the true 45th parallel and also the unrestricted privilege of floating timber down the St John River.[1] The Maine commissioners replied that, to permit free communication between the British colonies, they were willing to concede the St John River to three miles above the mouth of the Madawaska; thence, about west-north-west to the southern watershed of the St Lawrence. On July 11 Lord Ashburton replied that this line was wholly inadmissible, and suggested to Webster that the negotiations 'would have a better chance of success by conference than by correspondence.'

Three months had passed in fruitless negotiations, and it was evident that, if a settlement was to be arrived at, Lord Ashburton's suggestion must be adopted. Ashburton and Webster, therefore, abandoned written communications and adopted the plan of conferences. On July 29 Lord Ashburton signified his assent to the agreement as set forth in Webster's letter of the 27th—'being the final result of many conferences we have had on this subject.' It provided that the boundary should follow, from the source of the St Croix to the St John River, the due north line as surveyed and marked in 1817-18; thence up the deepest channel of the St John to the mouth of the St Francis River; thence up the St Francis to the outlet of Lake Pohengamook; thence south-westerly in a straight line to a point on the north-west branch of the River St John,

[1] On June 28 Webster wrote Edward Everett, United States minister at London, that 'our movement for the last ten days, if any has been made, has been rather backward. The boundary business is by no means in a highly promising state—so many difficulties arise, not only between us and England, but between us and the commissioners, and the commissioners of the two States themselves' (Curtis, *Life of Daniel Webster*, ii. p. 105).

which point should be ten miles distant from the main branch of the St John in a straight line and in the nearest direction ; but, if the said point should be found to be less than seven miles from the St Lawrence watershed, then the said point should be made to recede downstream to a point seven miles in a straight line from the watershed ; thence in a straight line in a course about S 8° W to the point where the parallel of 46° 25′ intersects the south-west branch of the St John ; thence southerly by this branch to the source thereof in the highlands at the Metjermette portage ; thence along these highlands to the head of Hall Stream ; thence down the middle of this stream till it intersected the ' old line ' surveyed by Valentine and Collins ; thence west along this line to the River St Lawrence.

On July 15 Webster communicated these terms to the commissioners for Maine and Massachusetts, as the best terms that could be obtained. He stated that the disputed area contained 12,027 square miles. Of this Great Britain would receive 5012 square miles and the United States 7015 square miles—893 square miles less than was awarded by the King of the Netherlands—but he pointed out that the seven-twelfths awarded to the United States was ' equal in value to four-fifths of the whole.' In addition, Great Britain was willing to concede to the United States the right to float timber down the St John River, free of all discriminating tolls, the same right being conceded to British subjects on the upper St John, with reference to timber cut in the portion of the upper St John basin awarded to Great Britain.

This arrangement conceded to the United States the territory at the head of the Connecticut, 145 square miles, and the narrow strip between the 45th parallel and the ' old line,' 62 square miles. These territorial concessions, however, enured only to the benefit of New Hampshire, Vermont and New York. To compensate Maine and Massachusetts Webster proposed that the United States should pay them $250,000, to be equally divided between them, and should reimburse them for expenditures for surveys of the boundary and for the civil posse. To these terms, with the addition of

$50,000 to the compensation, the commissioners of the two states finally assented. The treaty was signed at Washington on August 9, 1842.

Article I defined the boundary in accordance with the agreement between Lord Ashburton and Daniel Webster.

Article III provided for mutual right to float timber down the St John River.

Other articles validated all grants of land made by either government in the disputed areas; and provided for the surveying and marking of the whole line; for the distribution of the 'disputed territory fund,' consisting of timber dues received by New Brunswick on account of timber cut in the disputed area, and for the payment to Maine and Massachusetts of $300,000 in equal moieties. With regard to the inclusion of the 'money clause,' Lord Ashburton replied that he could not 'with any propriety be a party' to an agreement of this nature. Webster, however, satisfied Lord Ashburton by agreeing that formal diplomatic notes should be exchanged, explaining that this article contained nothing that could be construed as placing responsibility upon Great Britain.

In both countries the treaty was severely criticized. In the United States Senate, Senator Benton accused Webster of 'victimizing that deserted and doomed State,' Maine. Respecting Lord Ashburton's claim for the boundary, Senator Buchanan declared it was a 'bold and barefaced pretension.'

In Great Britain Lord Palmerston styled it 'Lord Ashburton's capitulation'; he recommended that he receive a new title, 'Earl Surrender,' and stigmatized him as 'a most unfit person for the mission upon which he had been sent.'

The treaty was ratified by the United States Senate, August 20, and was duly carried into effect. In 1843 Colonel J. B. Bucknall Estcourt and Albert Smith were appointed British and American commissioners respectively, to survey and monument the boundary. On June 28, 1847, they signed their final report at Washington.

'Battle of the Maps'

Before discussing the advantages or disadvantages that accrued to Great Britain by this settlement, commonly known as the 'Ashburton Treaty,' it is necessary to review the wordy warfare called the 'Battle of the Maps.'

(1) What is commonly known as the 'Red Line' map. When the treaty was under discussion Webster submitted a copy of this map to the Senate. Though no maps were attached to the treaties of 1782 and 1783, the negotiators of the treaty of peace had before them a copy of Mitchell's map of 1755, and it was assumed during all later negotiations that, if found, it would be conclusive. In the winter of 1840-41 Jared Sparks, an American, in making some researches in the archives of the *Affaires Étrangères* at Paris, found a letter of December 6, 1782, from Benjamin Franklin to the Comte de Vergennes, the French minister of Foreign Affairs. It was as follows:

'I have the honour of returning herewith the map your excellency sent me yesterday. I have marked with a strong red line, according to your desire, the limits of the United States, as settled by the preliminaries between the British and American plenipotentiaries.'

Sparks immediately made a search among the 60,000 maps in the archives, and found a map of North America by d'Anville, 1746, with the boundary marked as indicated by Franklin, drawn in red, apparently with a hair-pencil or a very blunt pen. The map was about eighteen inches square and the line was drawn completely round the United States. Near the 45th parallel it was so drawn as to give the United States more than the treaty gave, but in Maine it passed south of the St John River and conceded to Great Britain rather more than her claim. On February 15, 1842, Sparks, who seems to have kept the discovery to himself, 'wrote to Webster sending him a copy of the map and giving his ideas on the subject.'[1] In May Sparks, as the result of a conference with Webster, showed the 'Red Line'

[1] Mills, 'British Diplomacy and Canada,' *United Empire*, ii. p. 703.

and 'Steuben' maps to the governor of Maine. Judge Sprague, on Webster's behalf, endeavoured to influence prominent members of the Maine legislature. As a result the commissioners were appointed with full powers.

'The maps,' wrote Sparks to Everett on January 30, 1843, after the whole matter had become known, 'had some influence in procuring a favourable action on this point; and it is generally conceded that the treaty would not have gained the assent of the Maine Commissioners if these maps had not been laid before them.' On June 14, 1842, Webster wrote Everett, requesting him to '*forbear to press the search after maps in England or elsewhere.* Our strength is on the letter of the treaty.'

On August 17 the United States Senate debated the treaty in secret session. Senator William Cabell Rives, who had charge of it, exhibited the 'Red Line' map. In urging ratification he declared that 'there was great danger that our case would be weakened by new evidence. Here, he introduced the subject of the Franklin map, and said that, if the matter were to go to a reference again, this might be insisted on as evidence to the damage of the American alarms.'[1] Senator Benton objected to 'the solemn and mysterious humbuggery by which Dr Franklin had been made to play a part in ravishing this ratification from our claims,' and to the 'awful apparition of the disinterred map shown to alarm senators into ratification.' Though several adverse propositions were put forward, the treaty was ratified by thirty-nine to nine. Webster was successful, and differences that had on several occasions brought two great nations to the verge of war were laid to rest.

When, through the publication of the Senate debates, the use made of the map by Webster became known, he was bitterly assailed for 'over-reaching' Lord Ashburton. Webster, in a speech before the New York Historical Society, said that it was the duty of the United States government to lay before the Maine and Massachusetts commissioners all the information in its power.

[1] Curtis, *Life of Webster*, ii. pp. 133-4.

> Every office in Washington was ransacked, every book of authority consulted, the whole history of all the negotiations, from the Treaty of Paris downward, was produced, and, among the rest, this discovery in Paris to go for what it was worth. . . . I must confess that I did not think it a very urgent duty, on my part, to go to Lord Ashburton and tell him that I had found a bit of doubtful evidence in Paris, out of which he might, perhaps, make something to the prejudice of our claims, and from which he could set up higher claims for himself, or throw further uncertainty over the whole matter.

That exhibiting the map to the Maine and Massachusetts commissioners and to the Senate brought about the ratification of the treaty is indubitable. That Webster accepted the map as authentic, and that he was much alarmed lest its existence should become known to the British government, is also beyond doubt.

In these days, when the matter is of academic interest only, calm judgment indicates the value of the map as evidence as nil. There was no connection between the map and the letter ; no note on the latter to indicate that the accompanying map was in the archives ; a red line such as was indicated on the map could have been drawn by any one, at any time ; to assume that Franklin, one of the ablest men that the American colonies had produced, would draw such a line was to credit him with incredible stupidity and ignorance respecting the acts of state, maps, etc., of the previous twenty years. Finally, Sir Robert Peel, in the debate of March 21, 1843, stated that the British government had, prior to Lord Ashburton's negotiation, found at Paris the famous map. He said : 'There can be no doubt but that it is the map referred to by Mr Jared Sparks ; but we can trace no indication of connexion between it and the dispatch of Dr Franklin.'

The copy used by Webster has disappeared from the United States department of State, and the original seems to have disappeared from the French Archives.

(2) The 'Steuben' map above referred to was a copy of Mitchell's map found by Webster early in 1842. It had belonged to Baron von Steuben, who had assisted the Americans

during the War of Independence. It showed the boundary according to the British claim, but as Steuben had no connection with the negotiations nor any official status in the United States, it is of no importance.

(3) The 'Jay' map was discovered early in 1843 and was communicated to Gallatin by William Jay, son of John Jay, one of the United States negotiators of the treaty of peace. After the death of John Jay it had remained in the possession of another son, Peter A. Jay. It showed the boundary-line as following the St John River to the mouth of the Madawaska; thence up the Madawaska to its source; thence by the highlands and 45th parallel to the St Lawrence. On it was a red line 'designated through its whole extent as being Mr Oswald's *line*.' Gallatin claimed that it demonstrated the baselessness of the British claim, and that it was forwarded by Jay in October or November 1782 to Livingston, the United States secretary of state. The only basis for such a statement is a letter from Franklin, October 14, 1782, mentioning that the articles of the treaty *would be sent* by Jay at the first opportunity, but containing not a word about a map. Again, in 1797, only fifteen years after the treaty was concluded, Jay made an affidavit respecting his knowledge of the negotiations, and particularly with reference to maps.[1] Gallatin's argument is reduced to an absurdity, and his assumption that the map demonstrated the identity of Mitchell's 'Medousa Lake' and 'Nipissigouche' with the 'source of the St John,' claimed by the United States Congress, rests upon an exceedingly slight foundation.

(4) The United States department of State map. Judge Benson, in his report to the president, as one of the commissioners appointed under Article v of the Treaty of Ghent, stated that the agent for the United States, James Sullivan, had offered in evidence 'a Map of Mitchell, as the Identical Copy which the Commissioners had before them at Paris, having been found deposited in the Office of the Secretary of State for the United States, and having the Eastern Boundary of the United States, traced on it with a pen or pencil.'

[1] *Supra*, p. 761.

In November 1828 Gallatin, who was engaged in preparing the statement of the United States for submission to the king of the Netherlands, examined at the State department a Mitchell map stated to be the identical map in question. There had been traced on it, 'originally with a pencil and over it with a pen, the boundary of the United States in conformity with their claim.'[1] There was nothing to show that it was the map produced by Sullivan, and Gallatin decided it would be doing injury to the United States claim 'to attempt to support it by any equivocal or disputable evidence.' Between 1828 and the eighties, when John Jay addressed inquiries to the State department respecting it, this map—like the American 'Red Line' map—disappeared from the department of State.

(5) King George III's map. The British Museum also possesses a 'Red Line' map, but, unlike its famous prototype, it is of undoubted authenticity and of great interest. It is a copy of the Mitchell map, 1755. It hung in the library of King George III, and, with other books and maps, was donated to the Museum by his successor. The writer has in his possession another copy of the Mitchell map coloured in facsimile of the king's, and has also had ample opportunity to study the original. The results of the study are: (*a*) It is not, as stated by Moore and others, the veritable copy of Mitchell's map used in the negotiations of 1782; (*b*) it does not contain 'Oswald's line' upon it; (*c*) it was a map of reference used by King George III, doubtless in connection with discussions with his ministers respecting North American affairs; (*d*) the red line on it is designated '*Boundary as described by Mr Oswald*,' practically demonstrating that the line was drawn under Oswald's direct supervision.

Edward Everett, in a dispatch of March 13, 1843, states that there is a line on it, 'drawn with care with an instrument, from the lower end of Lake Nipissing to the source of the Mississippi . . . and has since been partly erased.' As a matter of fact, there is no 'partly erased' line from the lower end of Lake Nipissing *westward*. There is a line *southeastward* to where the 45th parallel strikes the St Lawrence—

[1] Gallatin, *Memoir on the North-eastern Boundary*, p. 48.

part of the boundary of Quebec by the proclamation of 1763—and it was 'partly erased' when the boundaries were altered by the Quebec Act, 1774. The foregoing, and the fact that boundaries by the Treaty of Utrecht and other information are indicated, prove conclusively that it was not the map used in 1782.

This map shows the line as claimed by the United States, but it is only fair to Lord Ashburton to say that on April 28, 1843, he wrote Webster that

> The map question now fortunately only interests historians. . . . I should have some curiosity to know how you unravel this, to me, inextricable puzzle; at present I will only say, what I know you will believe, that the discoveries here are quite recent, and were wholly unknown to me when I was at Washington. Not but that I agree entirely with you, that it would have been no duty of mine to damage the cause of my client, yet, at the same time, I perhaps went further in protestations of ignorance than I otherwise should have done.

(6) The Record Office map. This is a copy of Mitchell's map, described in the catalogue as *the map used by Mr Oswald.* 'This map was found in 1841, by Mr Lemon, but there is nothing on the map itself, nor does any documentary evidence exist, to support the statement in the Catalogue, which rests upon the *ipse dixit* of Mr Lemon. The "red line" is very faint, and the geographers who were consulted on the age of it were divided in their opinion.'[1]

The foregoing are the principal map evidences produced in this more or less noted 'battle.' Summed up, they prove that in 1782 and 1783 the government of Great Britain understood that the boundary followed the southern watershed of the River St Lawrence from its intersection with the due north line to the Connecticut River; that during the negotiations little attention was paid to the division of the inland territory forming the disputed area of a later time; and that the British government in 1814, when proposing a rectification of the frontier, believed that it was a simple matter of

[1] Fitzmaurice, *The Life of William, Earl of Shelburne*, iii. p. 324.

exchange. The title of Great Britain to any portion of the disputed territory, therefore, rested largely upon occupation. The one exception was the portion of the upper Restigouche that would have been cut off by the due north line if the latter were extended, as claimed by the United States, to the sources of the Metis. This was always a weak point in the American contention which would have been strengthened by frankly abandoning the claim to any portion of the Restigouche basin, and adopting a line following the watershed of the latter to the point at which it intersected the southern watershed of the River St Lawrence.

National Rights through Occupation

Regarded as an academic question, the national rights acquired by occupation are admirably set forth in a dispatch of Lord Salisbury's of May 18, 1896. In discussing the proposed general treaty of arbitration he says :

> There are essential differences between individual and national rights to land, which make it almost impossible to apply the well-known laws of real property to a territorial dispute.
>
> Whatever the primary origin of his rights, the national owner, like the individual owner, relies usually on effective control by himself or through his predecessor in title for a sufficient length of time. But in the case of a nation, what is a sufficient length of time, and in what does effective control consist ? In the case of a private individual, the interval adequate to make a valid title is defined by positive law. There is no enactment or usage or accepted doctrine which lays down the length of time required for international prescription ; and no full definition of the degree of control which will confer territorial property on a nation, has been attempted. It certainly does not depend solely on occupation or the exercise of any clearly defined acts. All the great nations in both hemispheres claim, and are prepared to defend, their right to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of 'Hinterland,' with its inevitable contradictions, indicates the unformed and

unstable condition of international law as applied to territorial claims resting on constructive occupation or control.

Since the above was written the Venezuela arbitration has practically enunciated the principle that thirty years' adverse possession constitutes a good title.

In the Madawaska fief Great Britain and her predecessor in title, France, had a seigniory granted in 1683. In the Madawaska and Aroostook settlements grants had been made by the New Brunswick authorities, and Great Britain had exercised jurisdiction in portions of the disputed area since about 1785. The Madawaska settlement extended up both banks of the St John to the mouth of the St Francis, and the highway from the Maritime Provinces to Quebec followed the St John and Madawaska Rivers. The authorities of Maine endeavoured to strengthen their claim by possession and jurisdiction, particularly in the area south of the St John.

So far as the *intent* of the negotiators was concerned, it is unquestionable that they intended to define the boundary as following, between the Bay of Fundy and the Connecticut River, the western boundary of Nova Scotia and the southern boundary of Quebec. In drafting the treaty they, unfortunately for Canada, followed the description of the boundary of Nova Scotia as defined in the commissions to its governors, instead of the grant to Sir William Alexander.

Results of the Ashburton Treaty

Summing up the results of the Ashburton Treaty, it is evident that, in the north-eastern portion of the territory, Great Britain got all that she could claim by virtue of possession, and more ; that she obtained much more than she could claim under the letter of the Treaty of Paris ; and that she obtained nearly 900 square miles of territory in the basin of the upper St John over and above that awarded by the king of the Netherlands. She conceded an area of 150 square miles in the basin of the upper Connecticut River. She also conceded a strip between the 45th parallel and the ' old line '

with an area of 73 square miles, but, as the 'old line' is in places south of the 45th parallel, she received, east of St Regis, a strip containing 11½ square miles. So far as these 'strips' were concerned, the United States and Great Britain had valid titles by virtue of occupation, and the *concessions* were simply validations. In addition to the foregoing the Ashburton settlement ended a controversy that had disturbed the relations of the two countries for nearly sixty years: that had, on several occasions, brought two great nations to the verge of war; and that had seriously interfered with commercial intercourse. Finally, it is worthy of note that the commission appointed to adjust the respective claims of New Brunswick and Quebec to the area west of the 'due north line' awarded to Great Britain by the Ashburton Treaty, reported in 1848, six years later, 'that a tract of country lies between the north highlands westward of the due north line, and the line of the United States, which, *according to the strict legal rights of the two provinces, belongs to neither*, . . . and which, in 1763, formed part of the ancient territory of Sagadahock.' This 'tract of country' was confirmed to Great Britain by the Ashburton Treaty.

Article III of the International Boundary Treaty of April 11, 1908, provided for repairing and renewing the monuments erected under Article VI of the Ashburton Treaty, and for marking the line through waterways by buoys, monuments and ranges. The surveys and monumenting under this article are now (March 1913) completed from the St Lawrence to Hall Stream, and from the St Croix to the St John. The St John and St Francis Rivers have been surveyed and reference monuments placed. Between the St Francis and Hall Stream work is now in progress.

Through the St Lawrence Basin to Lake of the Woods

From the point where the 45th parallel of north latitude 'strikes the River Iroquois or Cataraquy' (St Lawrence) the boundary, as defined in the treaty of 1783, follows 'along the

middle of said river into Lake Ontario, through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie, through the middle of said lake until it arrives at the water-communication between that lake and Lake Huron; thence along the middle of said water-communication into the Lake Huron; thence through the middle of said lake to the water-communication between that lake and Lake Superior.'

Through the St Lawrence and Great Lakes.—Article VI of the Treaty of Ghent recited the foregoing, and provided that 'whereas doubts have arisen what was the middle of the said River, Lakes and Water communications and whether certain Islands lying in the same were within the Dominions of His Britannic Majesty, or of the United States: in order, therefore, finally to decide these doubts, they shall be referred to 2 Commissioners' to be appointed in the same manner as those commissioned under Article V. It further provided that they should 'designate the Boundary' through the said waters and decide the title to each of the islands included therein, such designation to be final; in case of disagreement, a reference to be made to a 'Friendly Sovereign or State.'

John Ogilvy, of Montreal, was appointed as commissioner on the part of Great Britain, and Peter B. Porter of New York State on the part of the United States. On September 28, 1819, Ogilvy died at Amherstburg, of fever, and was succeeded by Anthony Barclay, a son of Thomas Barclay, British commissioner under Article V. On May 26, 1817, Samuel Hawkins presented his credentials as agent for the United States. On May 7, 1821, he was succeeded by Joseph Delafield. On June 1, 1818, John Hale presented his commission as British agent.

The initial meeting was held at Albany, November 18, 1816. On November 12, 1821, at a meeting held in New York city, the surveyors reported that the maps of the whole line were ready for inspection. On June 18, 1822, the commissioners reached an agreement.

The basis of division of the islands is set forth in a letter by David Thompson, the famous surveyor to the North-West

Company, and astronomer and surveyor for Great Britain. He says that

> When the survey was undertaken to decide the place of the above boundary line, several important questions arose not contemplated in the Treaty ; among which was that, as the middle of the River is a line equidistant from both banks of the River, this line would often intersect islands, which would give a boundary line on land, under circumstances very inconvenient to each Power, especially on civil and criminal processes, illicit trade, etc. etc. It was therefore determined that to whatever Power the greater part of an intersected island should belong, that power should have the whole of the Island.

Thompson had made surveys of the greater portion of Western Canada and had found that the deepest channel was usually much nearer the *north* side of rivers. When the survey was completed the United States commissioner contended for the deepest channel, but Barclay insisted on the letter of the treaty. The British Admiralty desired that Wolfe Island, opposite Kingston, be obtained. If it passed to the United States, fortifications could be erected on it that would threaten the British navy yard and forts. Barclay was successful in obtaining Wolfe Island in exchange for Grand Island, above Niagara Falls, and Barnhart and other islands, near Cornwall. It was also 'agreed that the boundary line should be 100 yards from the shores of all islands, and if the space between the opposite shores was less than 200 yards, then the boundary line should be the middle between the two shores.'

In addition to the questions that arose respecting the assignment of the islands, there were difficulties respecting the navigation of the boundary waters. In the autumn of 1821 it was proposed to the commissioners that they make with their final award a declaration that they had acted on the principle that the navigation of all waters traversed by the boundary should continue free and open to the citizens of both powers, irrespective of the course of the awarded line. The British minister at Washington, however, declined to sanction it on the ground that it would impugn what was a matter of right.

The award described the line in detail, and was accompanied by a series of maps on which the boundary-line was marked. After describing it through the River St Lawrence, it defines it as passing 'to the south of, and near, the islands called the Ducks, to the middle of the said lake [Ontario]; thence westerly, along the middle of said lake, to a point opposite the mouth of the Niagara River'; thence through the Niagara River to Lake Erie; 'thence southerly and westerly, along the middle of Lake Erie, in a direction to enter the passage immediately south of Middle Island'; thence through Detroit River and Lake and River St Clair to Lake Huron; 'thence through the middle of Lake Huron, in a direction to enter the strait or passage' between Drummond and Cockburn Islands; thence south and west of St Joseph Island to the 'foot of the Neebish Rapids.'

In 1826 the same commissioners, Barclay and Porter, acting under Article VII of the Treaty of Ghent, disagreed respecting the division of the islands in the St Mary River above St Joseph Island. The matter remained in abeyance till 1842, when Lord Ashburton and Daniel Webster were endeavouring to conclude a settlement of differences. On July 16, 1842, Lord Ashburton wrote Webster that he desired a clause inserted in the treaty providing that British vessels should have equal rights of navigation with United States vessels in certain channels of the St Lawrence and St Clair Rivers. Webster accepted and stipulated for similar privileges for United States vessels in the British channel east of Bois Blanc Island in the Detroit River.

Article VII of the Ashburton Treaty provided that

> the channels in the River St Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channels in the River Detroit on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the River St Clair with the lake of that name, shall be equally free and open to the ships, vessels, and boats of both parties.

In 1850 the government of the United States repre-

sented to the British government that it was desirable that a lighthouse should be erected in Lake Erie near the mouth of the Niagara River, but that the most eligible site—a small reef, known as Horseshoe Reef—was British territory. Great Britain, therefore, ceded to the United States such portion 'as may be found requisite for the intended lighthouse.'

Boundary from Lake Huron to the North-West Angle of Lake of the Woods

Article VII of the Treaty of Ghent provided that, as soon as the commissioners appointed under Article VI had executed the duties assigned to them, they should proceed to determine the boundary 'from the water-communication between Lake Huron and Lake Superior, to the most North-western Point of the Lake of the Woods,' to decide the ownership of several islands lying in the boundary waters, and to survey and mark portions of the boundary. It further provided for reference to an arbitrator in case of disagreement.

As soon as Barclay and Porter had concluded their award under Article VI on June 18, 1822, they instructed the surveyors to proceed with the surveys required under Article VII. The surveyors were instructed to ascertain the position of the 'Long Lake' of the treaty of 1783, or, if no lake of that name were found, to determine the chain of waters supposed to be referred to under that name; if no stream discharging the waters of Lake of the Woods into Lake Superior were found, they were to determine the streams that approximated most nearly to the line defined in the treaty. Surveys were made of the waters between Lake Huron and Lake of the Woods. In October 1824 it seemed likely that Pigeon and Rainy Rivers would be adopted as the boundary between the estuary of the former—assumed to be Long Lake—and Lake of the Woods, but the British commissioner ordered surveys of the route by way of the St Louis River which falls into Lake Superior at the site of the present city of

Duluth, and the United States commissioner ordered an exploration of the Kaministikwia, which empties into Lake Superior at Fort William.

The commissioners were unable to reach an agreement respecting two points of difference. In the St Mary River, between Lakes Huron and Superior, they disagreed respecting the assignment of St George (Sugar) Island. Barclay claimed it on the ground that, when dividing the islands under Article VI, they had agreed that when a middle line between the two shores divided an island into two unequal parts, it should be assigned to the nation to whose side the larger portion lay. Porter claimed it mainly on the ground that the navigable channel lay between it and the Canadian mainland. As Porter seemed to attach great importance to navigation Barclay offered, if St George Island were assigned to Great Britain, to stipulate that the channel east of it should remain free and open to both nations, provided Porter would make a similar stipulation respecting the St Lawrence channel near Barnhart Island and the American channel in the St Clair River. Porter rejected the offer.

By Article VI of the Ashburton Treaty St George Island was conceded to the United States. It is worthy of note that, owing to improvements, the channel *west* of St George (Sugar) Island—and, therefore, altogether in United States territory—is now used by all vessels except an occasional small craft.

The second point of difference was the line from Isle Royale in Lake Superior to Lake of the Woods. Barclay claimed that the boundary should run from Isle Royale south-westerly to the head of the lake, thence by way of the St Louis and Vermilion Rivers to the Grand Portage canoe route, and thence by the latter to Lake of the Woods. Porter contended that the line should follow the Kaministikwia canoe route to its junction with the Grand Portage route, and thence by the latter to Lake of the Woods.

The treaty of 1783 defined the boundary as passing 'through Lake Superior, northward of the Isles Royal and Phelipeaux, to the Long Lake; thence through the middle

of said Long Lake, and the water-communication between it and the Lake of the Woods to the said Lake of the Woods.' Barclay claimed the St Louis River on the following grounds :

(1) That the treaty defined the boundary as running 'through Lake Superior . . . to the Long Lake' instead of following the wording used with reference to the other Great Lakes, viz., 'through said lake to and through the water-communication into the lake,' etc. It was, therefore, evident that the lake described in the treaty immediately united with Lake Superior without any contracted separation. St Louis River answered this description since it contained a lake-expansion at its mouth, whereas Pigeon River emptied into a bay.

(2) That it was an ancient commercial route. While Pigeon River also possessed this qualification, the only lake of the Pigeon River route answering to the description of 'Long Lake' was Crooked Lake, an expansion in the upper waters of Rainy River. The Kaministikwia route was a comparatively new one, and Dog Lake, claimed by Porter as 'Long Lake,' was eighty miles upstream ; there were numerous portages between it and Superior ; it had been known as Dog Lake since its discovery, and its form did not entitle it to be called 'Long' Lake.

(3) That the St Louis was the more navigable, more direct, and was interrupted by few portages ; that even the Pigeon River route, as compared with the Kaministikwia, was a more 'direct and continuous water-communication.'

(4) That on many old maps it was designated 'The Lake or St Louis River.'

(5) That as the treaty defined the boundary as passing 'through Lake Superior, northward of the Isles Royale and Phelipeaux,' it was a fair deduction that, after passing the said islands, it should run southwardly ; and, if the 'Long Lake' of the treaty lay to the north of Isle Royale, it was difficult to understand the specific direction 'northward' when that was its natural direction.

Commissioner Porter claimed the canoe route by way of

the Kaministikwia River as the boundary on the following grounds :

(1) That the isle 'Phelipeaux' of the treaty included Pie and other islands in a chain lying to the westward of Isle Royale, and that the line from the latter to Long Lake must pass to the northward of them. He identified Dog Lake, an expansion of the upper Kaministikwia, with Long Lake.

(2) The boundary claimed by the British commissioner, after passing to the northward of Isle Royale, turned south-westward to the head of the lake, describing a great arc and passing comparatively close to the British shore, simply to give an unimportant island—Royale—to the United States. Inasmuch as a straight line from St Mary River to the mouth of the Kaministikwia would intersect the eastern portion of Isle Royale, the most direct route would pass to the northward of Royale, whereas the direct route to Pigeon River and to St Louis River passed to the south of it.

(3) The Kaministikwia canoe route had probably been used by the French, and was still used by the English. It was the best, and afforded more continuous water-communication than any other.

Mitchell's map, used by the negotiators of the treaty of 1783, showed Long Lake at the mouth of Pigeon River, and, partly for this reason, Porter was willing to accept a line up Pigeon River, and thence by the most continuous water-communication to Rainy Lake—a common point on the Kaministikwia, Pigeon and St Louis routes to Lake of the Woods. Barclay offered to accept the same line, provided it commenced at the eastern end of Grand Portage, six miles south-west of the mouth of the Pigeon River, and went thence by way of the Pigeon River route through the navigable waters and connecting portages. Although this only involved the concession of an area of twenty-two square miles between Pigeon River and the Grand Portage, Porter declined to accept it, contending that the treaty required a water-communication wherever one could be found. On the ground that he would be exceeding his powers, he also declined Barclay's offer to take the Pigeon River route,

coupled with the stipulation that the Grand and other portages should be free and open to the subjects of both nations. Porter seems to have been under the impression that partisanship and his duties as an arbitrator were synonymous.

On October 23, 1826, to avoid any future misunderstandings, the commissioners caused to be entered in the journals a statement of the points on which they disagreed, and described the portion of the line on which they were agreed. As already stated,[1] both claimed St George (Sugar) Island in St Mary River.

Respecting the boundary from the head of Sugar Island to Isle Royale in Lake Superior they were in agreement. From Isle Royale the United States commissioner claimed that the boundary should pass north of Pie Island to the mouth of the Kaministikwia River; thence by way of the Kaministikwia canoe route to Lac la Croix, where it joined the Pigeon River or Grand Portage route; thence by the Namakan River to Namakan Lake, where it joined the St Louis River route; thence through the middle of Namakan Lake and its water-communication to Rainy Lake, where it joined the line claimed by Barclay. The British commissioner claimed that from Isle Royale the line should pass through the middle of Lake Superior to the mouth of the St Louis; thence up the St Louis to the head of its Embarras tributary; thence by the Vermilion River to Namakan Lake; thence, by the same route as claimed by Porter, to Rainy Lake.

From Rainy Lake to Lake of the Woods they were in agreement respecting the boundary, and defined it as passing through the middle of Rainy Lake to its *sortie*; thence down the middle of Rainy River to Lake of the Woods; thence north-westerly and westerly to the head of a bay, 'being the most north-western point of the Lake of the Woods,' in latitude 49° 23′ 55″ N and longitude 95° 14′ 38″ W.

On July 16, 1842, Lord Ashburton wrote Webster proposing that 'the line be taken from a point about six miles south of Pigeon River, where the Grand Portage commences on the lake, and continued along the line of said portage,

[1] *Supra*, p. 832.

alternately by land and water, to Lac la Pluie [Rainy Lake], the existing route by land and by water remaining common to both parties.'

On the 27th Webster replied that he was willing to agree on a line following the Pigeon River or Grand Portage route to Rainy Lake, it being understood that all the water-communications and portages should 'be free and open to the use of the subjects and citizens of both countries.'

Lord Ashburton accepted these terms, and they were incorporated in the treaty. Article II of the Ashburton Treaty described the boundary from the point in the St Mary River where the commissioners under Article VI of the Treaty of Ghent concluded their labours. The boundary was defined so as to leave St George (Sugar) Island to the United States; thence through Lake Superior as agreed by the commissioners under Article VII; from Isle Royale 'through the middle of the sound between Isle Royale and the north-western main land, to the mouth of Pigeon River, and up the said river . . . to the lakes of the height of land between Lake Superior and the Lake of the Woods'; thence through the water-communication 'to that point in Lac la Pluie, or Rainy Lake, at the Chaudière Falls, from which the Commissioners traced the line to the most north-western point of the Lake of the Woods. . . . It being understood that all the water-communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage . . . as now actually used, shall be free and open to the use of the citizens and subjects of both countries.'

Review of the Awarded Boundary under Articles VI and VII of the Treaty of Ghent

Reviewing the division of the islands in the River St Lawrence, there can be no doubt that Great Britain fared well. She secured the largest and most valuable, Wolfe Island, with an area of 49 square miles, and nearly half the others. In the St Mary River, St Joseph Island, 142 square miles, was awarded to her; and Sugar Island, 40½ square miles, and

Encampment Island, 15½ square miles, passed to the United States. On the King George III map the boundary-line is drawn indicating Cockburn and St Joseph Islands—both awarded to Great Britain—as United States territory, and Sugar Island—awarded to the United States—as British territory.

In Lake Superior the inclusion of Philipeaux Island in the boundary description caused much confusion. The error is due to Mitchell's map, wherein Isle Royale is indicated twice, first under its own name and again as a large island—'I. Philipeaux'—lying south-east of it. There is a similar duplication of our present Michipicoten Island, which appears as 'I. Maurepas,' and, again, as 'Pontchartrain I.'

Before considering the question of 'Long Lake' it is necessary to revert to the negotiations of 1782. The basis of division finally agreed upon was to follow the middle of the St Lawrence River proper, and its upward continuation. Unfortunately for Canada, Mitchell's map, upon which the negotiators relied, showed a large unnamed river flowing *from Lake of the Woods* to Lake Superior and, near its mouth, passing through an expansion designated 'Long Lake.' The Mississippi was only indicated to the southern border of an 'inset' map in the north-west corner of the map, but was shown as a large stream that probably had its source far to the north. The boundary was therefore carried up what appeared to be much the largest stream emptying into Lake Superior, and thence due *west* to the Mississippi. As a matter of fact, later explorations showed that the source of the Mississippi is due *south* of Lake of the Woods.

Respecting 'Long Lake' there can be no doubt of its identity with the present Pigeon Bay. The stream *from* Lake of the Woods represents Rainy River, which, as we now know, flows *into* it. Near Lake Superior it represents Pigeon River, a small stream that empties into Superior. But for this geographical error the line would almost certainly have been drawn to the head of Lake Superior; thence up the St Louis River to its source; and thence due west to the Mississippi—a much more favourable line for Canada.

Here, as on the New Brunswick and Quebec frontier, British

diplomacy at a later date strove, and partially succeeded, in repairing the damage done by Oswald and Shelburne in 1782.

Bryce-Root Treaty, 1908

By Article IV of the Boundary Treaty, signed at Washington, April 11, 1908, the existing International Waterways Commission was 'empowered to ascertain and re-establish accurately the location of the international boundary line' through the River St Lawrence, the Great Lakes and connecting waterways. It further provided that wherever the boundary is shown by a curved line along the water, they are authorized to substitute for it a series of connecting straight lines 'following generally the course of such curved line'; also that the line shall be marked by buoys and monuments in the waterways where practicable; elsewhere by range marks on adjacent shores.

The Rivers and Harbours Act, 1902, requested the president 'to invite the Government of Great Britain to join in the formation of an international commission. . . . to investigate and report upon the conditions and uses' of the St Lawrence waters, adjacent to the boundary between Canada and the United States. The invitation was duly communicated. On the part of Great Britain, J. P. Mabee, Wm. F. King and Louis Coste were appointed. Colonel O. H. Ernst, George Clinton and Gardner S. Williams were appointed on the part of the United States. In 1905 Mabee resigned, and was succeeded by George C. Gibbons. In 1907 Wm. F. King was succeeded by W. J. Stewart. Of the United States commissioners, Gardner S. Williams was succeeded by G. Y. Wisner; later, Wisner was succeeded by E. E. Haskell.

To date, March 1913, the 'connecting straight lines' have been tentatively laid down on the charts, but differences have arisen respecting the deviation from the curved lines.

Article V of the Bryce-Root Treaty provided for the re-establishment of the boundary line between the mouth of Pigeon River and the north-westernmost point of Lake of the Woods. It further provided for the marking of the

boundary similarly to Articles I, II and III. Under the provisions of the article Wm. F. King was appointed commissioner on the part of Great Britain, and O. H. Tittmann on the part of the United States. To March 1913 some triangulation had been completed and part of Pigeon River and Lake of the Woods between North-west Angle and Big Island had been surveyed.

From Lake of the Woods to the Pacific Ocean

The international boundary between Canada and the United States, as defined in the treaty of 1783, followed the water-communications from Lake Superior to the 'north-westernmost point' of Lake of the Woods, 'and from thence on a *due west* course to the River Mississippi; thence by a line to be drawn along the middle of the said River Mississippi,' etc. As already stated [1] this description was based upon the erroneous delineation in Mitchell's map, of the topography of this area. Shortly after the treaty was signed the accuracy of the map was impugned, and it was stated that a line drawn due west from Lake of the Woods would not intersect the Mississippi.

Article V of the Hawkesbury-King convention, concluded May 12, 1803, provided that 'Whereas it is uncertain whether the River Mississippi extends so far to the Northward as to be intercepted by a Line drawn due West from the Lake of the Woods . . . it is agreed that . . . the Boundary of the United States in this quarter shall . . . be the shortest line which can be drawn between the North-west Point of the Lake of the Woods and the nearest Source of the River Mississippi.'

On April 30, 1803—two weeks earlier—France and the United States had concluded a treaty whereby the former ceded to the United States 'the Colony or Province of Louisiana with the same extent that it now has in the hands of Spain, & that it had when France possessed it.' Fearing that the Hawkesbury-King convention might affect the rights acquired under the Louisiana Treaty, the United States Senate ratified it without the fifth article. The British

[1] *Supra*, p. 753.

government, however, refused to accept the amended treaty.[1]

On September 5, 1804, Monroe delivered to Lord Harrowby a paper in which he reviewed the negotiations affecting the boundary east and west of Lake of the Woods. He stated that commissaries appointed under Article X of the Treaty of Utrecht had

> fixed [2] the northern boundary of Canada and Louisiana by a line beginning on the Atlantic, at a cape or promontory in 58° 30′ north latitude; thence, south-westwardly to the Lake Mistassin; thence, further south-west, to the latitude 49° north from the equator, and along that line indefinitely. . . . It was not contemplated by either of them [the negotiators of the treaty of 1803] that America should convey to Great Britain any right to the territory lying westward of that line, since not a foot of it belonged to her; it was intended to leave it to Great Britain to settle the point as to such territory, or such portion of it as she might want, with Spain, or rather with France, to whom it then belonged . . . the stipulation which is contained in the fifth article of the convention has become, by the cession made by the [Louisiana] treaty, perfectly nugatory; for, as Great Britain holds no territory southward of the forty-ninth degree of north latitude, and the United States the whole of it, the line proposed by that article would run through a country which now belongs exclusively to the latter.

On December 31, 1806, Lords Holland and Auckland, on the part of Great Britain, and James Monroe and William Pinkney, on the part of the United States, signed a treaty of

[1] James Monroe, United States minister at London, wrote that Lord Harrowby, the foreign secretary, when informed that it had been ratified without the fifth article, 'censured in strong terms the practice into which we had fallen of ratifying treaties, with exceptions to parts of them, a practice which he termed new, unauthorized, and not to be sanctioned. . . . He observed with some degree of severity . . . that, having discovered since this treaty was formed that you had ceded territory which you do not wish to part with, you are not disposed to ratify that article' (*American State Papers, Foreign Relations*, iii. p. 93).

[2] The accuracy of the statement that the commissioners under the Treaty of Utrecht had settled the boundary was first challenged by Greenhow in the *Washington Globe* of January 15, 1840. See also Greenhow's *History of Oregon and California*. The *Arbitration Papers* in the Ontario-Manitoba Boundary Case contain conclusive evidence that no settlement was arrived at. See also pp. 886-91.

amity and commerce. After the treaty was concluded the British negotiators proposed a supplemental convention defining the boundary from the north-west angle of Lake of the Woods. They proposed that it be drawn due south to the 49th parallel and thence due west ' as far as the territories of the United States extend in that quarter . . . provided that nothing in the present article shall be construed to extend to the north-west coast of America, or to the territories belonging to or claimed by either party, on the continent of America, to the westward of the Stony Mountains.' Eventually, to meet the objections of the American commissioners, the words ' as far as their said respective territories extend in that quarter ' were substituted for ' as far as the territories of the United States extend in that quarter.' However, as the treaty itself did not contain a renunciation by Great Britain of the right of impressment, President Jefferson refused to submit it to the Senate.

This proposal was an official acknowledgment by Great Britain that, by the Treaty of Utrecht, the 49th parallel formed the boundary between the Hudson's Bay Company's territories and Louisiana. The first suggestion of this line had appeared in instructions from Madison, United States secretary of state, to Monroe, bearing date February 14, 1804. Madison said that ' there was reason to believe ' that the commissioners had decided upon that parallel as the boundary. He continued : ' But you will perceive the necessity of recurring to the proceedings of the commissioners, as the source of authentic information.' The proposal by the British negotiators was doubtless due to the fact, that during the negotiations under the Treaty of Utrecht the *British commissioners contended* for the 49th parallel as the southern boundary of British territory, the French commissioners, claiming the territory to within about fifty miles from Hudson Bay. The commissioners, however, disagreed, and no settlement was arrived at. Unfortunately for British interests, British geographers adopted the British contention, and on their maps the 49th parallel was stated to be the southern boundary of the Hudson's Bay Company's territories. When, in 1763, the whole of Canada passed to Great Britain, the question of

title became of academic interest only, but the erroneous impression respecting the 49th parallel fostered by the maps had received general acceptation. In any event, it was the British claim respecting the boundary between the Hudson's Bay Company's territories and Canada, not between the former and Louisiana, as stated by Madison. The true northern boundary of Louisiana was the northern watershed of the Mississippi and Missouri Rivers. As a result of this misunderstanding, the southern boundary of Canada across half the continent rests upon a mistaken idea.

In the negotiations for the Treaty of Ghent, 1814, the British plenipotentiaries offered to accept the 49th parallel from Lake of the Woods westward as the boundary, but coupled their acceptance with a stipulation for the free navigation of the Mississippi. As the latter proposition was unacceptable to the Americans, the article was omitted altogether.

In 1818 a convention respecting fisheries, boundaries, etc., was concluded at London. The negotiators for the United States, Albert Gallatin and Richard Rush, proposed that the 49th parallel should be made the boundary between Lake of the Woods and the Pacific. The British negotiators, F. J. Robinson and Henry Goulburn, 'did not make any formal proposition for a boundary, but intimated that the river [Columbia] itself was the most convenient that could be adopted, and that they would not agree to any that did not give them the harbour at the mouth of the river, in common with the United States.' Later, the British negotiators proposed the insertion of an article providing that the 49th parallel should be the boundary westward to the Rocky Mountains, and that, west of the Rockies, the country between the 45th and 49th parallels should be free and open to the citizens of both countries. To this the Americans demurred. Eventually, to meet the objections of the American negotiators, Article III was modified to read that

> any country that may be claimed by either party on the north-west coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date

of the signature of the present convention, to the vessels, citizens, and subjects of the two Powers: it being well understood, that this agreement is not to be construed to the prejudice of any claim, which either of the two high contracting parties may have to any part of the said country etc.

In 1821 the emperor of Russia issued his famous ukase which forbade 'all foreign vessels not only to land on the coasts and islands' between Bering Strait and the 51st parallel, 'but also to approach them within less than a hundred Italian miles' under penalty of confiscation of vessel and cargo. As this was also an assertion to territorial rights to this area, Great Britain and the United States promptly protested it. Four months after the convention of 1818 with Great Britain the United States had acquired by the Treaty of Florida Blanca, February 22, 1819, all the territorial rights of Spain on the Pacific coast north of latitude 42° N. Basing the claims of the United States on the discoveries of Captain Gray, and of Lewis and Clark, and as the successor in title to Spain, John Quincy Adams, United States secretary of state, instructed Richard Rush, United States minister at London, to 'stipulate that no settlement shall hereafter be made on the Northwest Coast or on any of the islands thereto adjoining by Russian subjects south of latitude 55°, by citizens of the United States north of latitude 51°, or by British subjects either south of 51° or north of 55°,' latitude 51° being fixed as approximating to the latitude of the upper portion of the Columbia.

George Canning, British secretary for Foreign Affairs, was astounded at these pretensions,[1] and, as a result, Great

[1] Rush, in his *Residence at the Court of London*, p. 469, says that Canning wrote him respecting a memorandum left by him (Rush):

'*Or north of fifty-five.*'

'What can this intend? Our *northern* question is with Russia as our *southern* with the United States. But do the United States mean to travel *north* to get *between* us and Russia? and do they mean to stipulate against Great Britain, in favour of Russia, or reserve to themselves whatever Russia may not want?'

Rush replied that Canning had read his note correctly. Canning wrote him that he would take Rush's explanation 'like the wise and wary Dutchman of old times, *ad referendum*, and *ad considerandum*.' See also p. 921.

Britain declined to join the United States in the negotiation with Russia. Rush then entered upon a separate negotiation with Great Britain. William Huskisson and Stratford Canning, the British negotiators, totally declined the proposition respecting the limitation of British settlement on the west coast, and totally denied the validity of the claims of Spain and of the United States as based on the discoveries of Gray, and Lewis and Clark. 'They said that Great Britain considered the whole of the unoccupied parts of America, as being open to her future settlements in like manner as heretofore. They included within these parts as well that portion of the North West Coast lying between the 42nd and 51st degrees of latitude, as any other parts.'[1] Finally, the British negotiators offered to accept the 49th parallel to its intersection with the Columbia '*and thence, down, along the middle of the Columbia, to the Pacific Ocean*; the navigation of this river to be forever free to the subjects and citizens of both nations.'[2] Rush declared his 'utter inability to accept such a boundary,' but offered to shift the '*southern* line as low as 49° in place of 51°.' This proposal was rejected by the British plenipotentiaries.

On April 17, 1824, the United States and Russia concluded a treaty whereby it was agreed that citizens of the United States would not form settlements north of latitude 54° 40′, and that Russian citizens would not form settlements south of it. On February 28, 1825, Great Britain also concluded a treaty with Russia which limited Russian America, on the south, by latitude 54° 40′, and, on the east, by the first range of mountains and the 141st meridian. These treaties eliminated Russia and left the territory to the south of 54° 40′ to be divided between Great Britain and the United States.[3]

[1] Rush, *Residence at the Court of London*, p. 598.

[2] *Ibid.*, p. 607.

[3] 'That this treaty virtually annulled the convention of the preceding year, between Russia and the United States, is evident; for the *convention* rested entirely upon the assumption that the United States possessed the same right to the part of the American coast south of the parallel of 54° 40′ which Russia possessed to the part north of that parallel · and the *treaty* distinctly acknowledged the former or southern division of the coast to be the property of Great Britain' (Greenhow, *History of Oregon and California*, p. 343).

In 1826 negotiations were resumed at the instance of Canning. The claim formulated by Rush was reaffirmed, but Gallatin, United States minister at London, was instructed to offer as the 'ultimatum' of the United States 'the extension of the line on the parallel of 49°' from the Rockies to the Pacific. He was also authorized to concede the navigation of 'the branches of the Columbia River which are navigable from where it [the 49th parallel] intersects them to the ocean.' The British plenipotentiaries, Huskisson and Addington, replied that 'the United States had no right to dispossess a single British subject, or in any way to exercise jurisdiction in any part of the territory in question.' They also objected to the 49th parallel line on the ground that it would cut off the southern portion of Vancouver Island. Later, Gallatin intimated that he was willing to concede the southern portion of Vancouver Island in return for compensation elsewhere. He had in view the exchange for it of 'the whole or part of the upper branches of the Columbia River' north of latitude 49° N. The British negotiators replied that, as the United States claimed that the British proposal only left them one seaport, and that difficult of access, they were willing to concede the peninsula bounded on the south by a line from Grays Harbour to the head of Hood Canal, and, on the east, by the peninsula east of Hood Canal and Admiralty Inlet—an area of about 5400 square miles. With this exception they adhered to the line of the Columbia River. To this proposition Gallatin replied that he 'rejected it at once.' As the negotiators were unable to reach an agreement they concluded, on August 6, 1827, a convention extending indefinitely Article III of the convention of 1818, subject to termination by either party on twelve months' notice.

It is necessary here to consider the grounds upon which Great Britain and the United States, respectively, based their claims to the area in dispute, prefacing the survey by a historical review.

Historical Review

On June 7, 1494, Spain and Portugal concluded at Tordesillas a treaty of Partition of the Ocean whereby the Portuguese were awarded exclusive territorial rights *east* of the meridian line passing 370 leagues west of the Cape Verde Islands, and the Spaniards were awarded similar rights *west* of the same meridian. Bulls had previously been secured from Pope Nicholas V and Pope Alexander VI, granting these privileges. The English, however, disregarded the papal prohibitions and sent out expeditions of discovery.

In 1542 Cabrillo (Sp.) examined the west coast of North America to latitude 37° 10′ N. In the following year his successor, Ferrelo, reached latitude 40° 20′ N, and possibly farther north.

In 1579 Sir Francis Drake (Br.) explored the Pacific coast of North America as far as 48° N latitude. He landed at Bodega Bay, about forty miles north of the present city of San Francisco, took possession of the country in the name of Queen Elizabeth, and named it New Albion.

In 1582 Gali (or Gualle) reached latitude 37½° N. It was a private mercantile enterprise, and was not authorized by the government of New Spain.

One of Vizcaino's (Sp.) ships is supposed to have reached 43° N in 1603.

In 1741 Bering (Russ.) sighted a mountain in latitude 60° N and named it St Elias. His subordinate, Chirikof, discovered land in 55° 41′ N latitude, and coasted to latitude 58° 21′ N.

Before 1779 the Spaniards had formed establishments as far north as San Francisco. In 1774 Perez (Sp.) sighted the present Queen Charlotte Islands, and, possibly, Nootka Sound. He reached latitude 54° N. In 1775 Heceta (Sp.) discovered the river now known as the Columbia, and named it Rio de San Roque. One of his vessels, commanded by Bodega, reached 58° N latitude, thus overlapping the discoveries of the Russians. The accounts of Perez's and Heceta's voyages were suppressed by the Spaniards, and

nothing definite was known concerning them till after the publication of the journals of Cook's voyage.

In 1776 Cook (Br.) was instructed to proceed to the coast of New Albion in latitude 45° N, a circumstance which showed that the British government had no intention of relinquishing any rights acquired by Drake in 1579. He was to proceed northward to latitude 65° N, where he was to begin his search for a passage to Hudson Bay or Baffin Bay. As no Spanish discoveries made subsequent to Vizcaino's in 1603 had been published, and as the accounts of the Russian voyages were very imperfect, these instructions were in accordance with international law. Cook surveyed the coast from latitude 47° N to Icy Cape in the Arctic Ocean. Although the coast had been sighted at various points by Perez, Bodega, Heceta, Bering and Chirikof, Cook's observations were infinitely more minute and more important than those of any, or all, of the other navigators who had preceded him.

One result of the publication of Cook's journals was an influx of fur traders. Among the first persons engaged in the trade were British subjects, sailing under Portuguese colours to evade the penalties for invading the chartered rights of the South Sea Company or of the East India Company. One of the principal places of resort of the fur traders was Nootka Sound on the west coast of Vancouver Island. In 1788 an expedition commanded by John Meares, a half-pay lieutenant in the British navy, was fitted out at Macao, China, to trade on the west coast of North America, and sailed under the Portuguese flag. Meares entered the estuary of the Columbia in search of the good harbour reported at Ensenada de Heceta by the Spaniards. Not finding it, he named the waters Deception Bay and a cape at the entrance Cape Disappointment. Though he did not recognize it as the mouth of a river, he thus rediscovered the Rio de San Roque of Heceta —the Columbia River of the present day.

As the Spaniards claimed the whole of the west coast of North America, considerable uneasiness was created at Madrid by statements in Cook's works respecting the Russian establishments in what is now Alaska, and by the influx of

fur traders into the North Pacific. In 1789 Martinez, a Spanish naval commander, seized at Nootka, under circumstances that were nearly equivalent to piracy, four vessels of Meares's trading fleet. The British government demanded immediate restoration of the vessels seized and reparation for the losses and injuries sustained by the British traders.

On October 28, 1790, a treaty between Great Britain and Spain, commonly called the Nootka Convention, was signed at the Escurial. Articles I and II provided for the restoration by Spain of the buildings and lands seized at Nootka in 1789 and reparation for all losses. Article V provided that, on the north-western coasts of North America north of the parts already occupied by Spain, wherever the subjects of either power had made settlements since 1789 or 'shall hereafter make any, the subjects of the other shall have free access, and shall carry on their trade, without any disturbance or molestation.'

On January 11, 1794, a supplementary treaty was signed at Madrid. After reciting that subjects of both powers had equal rights of frequenting Nootka Sound, it provided that 'neither the one nor the other of the two parties shall make any permanent establishment in the said port, or claim there any right of sovereignty or territorial dominion to the exclusion of the other. And their said Majesties will assist each other mutually to maintain to their subjects free access to the said port of Nootka against any other nation which should attempt to establish there any sovereignty or dominion.' It is worthy of note that *this secret treaty was probably not known to the American diplomats during the Oregon controversy, and was first published in 1862.*

In 1792 Captain Vancouver arrived on the north-west coast as commissioner on the part of Great Britain to determine what lands and buildings were to be restored by Spain, and the amount of indemnity due British claimants. He was also instructed to survey the coast from latitude 35° N to 60° N, to ascertain the existing settlements, and to determine definitely the existence, or non-existence, of any water-passage that might serve as a channel for commercial intercourse between the west coast and the British territories on the east coast.

As already stated, Heceta had, in 1775, discovered the Ensenada de Heceta, and concluded that it was the mouth of a river. While his report was not made public, the river was indicated on charts ; Meares, in 1788, had confirmed Heceta's discovery of the bay, but failed to discover that it was the estuary of a river ; in 1792 Vancouver observed that there was *river-coloured water* in the bay, but concluded that, under the instructions of the Admiralty, the opening was not of sufficient importance to justify examination ; a fortnight later Gray discovered that it was a river, and explored the estuary for twenty miles ; later, Vancouver's lieutenant, Broughton, examined the river for one hundred miles—eighty miles above Gray's 'farthest'—and formally took possession for Great Britain.

In 1793 Alexander Mackenzie (Br.) ascended Peace River, and made his way across the intervening territory to the Pacific in latitude 52° 20′. This was the first expedition of civilized men through the country west of the Rocky Mountains. In 1800 Duncan M^c^Gillivray, a British fur trader, ascended the North Saskatchewan River and discovered the Howse Pass. He travelled four miles down the Blaeberry River, and was thus the first white man to discover the upper waters of the Columbia.

As already mentioned, Louisiana was ceded to the United States in 1803. In the following year Captains Lewis and Clark were commissioned by President Jefferson to explore the Missouri River to its source, and also to seek some water-communication thence to the Pacific. In 1805 these explorers descended the Snake and Columbia Rivers to the Pacific. In 1806 the North-West Company, a British company, established Fort Fraser in latitude 54° N—the first settlement made in the so-called Oregon territory by civilized man. In 1807-11 they established other posts in the basin of the Columbia, and explored the main stream and its principal branches. In 1808 the Missouri Fur Company established a trading post on Snake River—the first establishment made by citizens of the United States, west of the Rockies. It was abandoned in 1810. In 1807 the North-West Company built Kootanae House near Columbia Lake, the head-waters of the Columbia River. Prior to the construction of Astoria

they had built at least four posts south of latitude 49° N, viz. Fort Kootenae Falls (1808), Kullyspell House (1809), Saleesh House (1809) and Spokane House (1810?). In 1811 the Pacific Fur Company, an American company, founded Fort Astoria at the mouth of the Columbia. In 1813 Great Britain and the United States were at war, and Astoria was sold to the North-West Company to prevent its capture by a British man-of-war.

The Treaty of Ghent, 1814, provided that possessions taken during the war should be restored. In virtue of this article the United States announced that they intended to reoccupy Astoria. Great Britain claimed that the title had passed to British subjects by peaceful purchase, but, that 'not even the shadow of a reflection might be cast upon the good faith of the British government,' it was restored to the United States.

On May 20, 1818, Adams wrote Rush explaining that it was through inadvertence that Great Britain had not been notified that the United States was sending a sloop of war to resume possession of Astoria. He wrote: 'As it was not anticipated that any disposition existed in the British Government to start questions of title with us on the borders of the South Sea, we could have no possible motive for reserve or concealment with regard to the expedition of the *Ontario*.' He instructed Rush to give Castlereagh

> to understand, though not unless in a manner to avoid everything offensive in the suggestion, that, from the nature of things, if in the course of future events it should ever *become* an object of serious importance to the United States, it can scarcely be supposed that Great Britain would find it useful or advisable to resist their claim to possession by systematic opposition. If the United States leave her in undisturbed enjoyment of all her holds upon Europe, Asia, and Africa, with all her actual possessions in this hemisphere, we may very fairly expect that she will not think it consistent either with a wise or a friendly policy to watch with eyes of jealousy and alarm every possibility of extension to our natural dominion in North America, which she can have no solid interest to prevent, until all possibility of her preventing it shall have vanished.

That the United States should agree to leave Great Britain '*in undisturbed enjoyment*' *of her territorial possessions in Europe, Asia and Africa* is delicious. 'It is doubtful if Rush found an opportunity to communicate Adams' surprising suggestion to Castlereagh without avoiding everything offensive.'[1]

In 1826, when the ten-year period of joint occupation was drawing to a close, negotiations for a settlement of boundaries were carried on by Huskisson and Addington and by Gallatin. The protocols attached to the sixth and seventh conferences are admirable statements of the British and United States cases respectively.

British Statement

The British plenipotentiaries asserted that over a large portion of the disputed territory, namely from latitude 42° N to 49° N, the United States claimed full and exclusive sovereignty, whereas Great Britain *claimed no exclusive sovereignty over any portion of it.* Her claim was limited to a right of joint occupancy, in common with other states, leaving the right of exclusive dominion in abeyance. In brief, the pretensions of the United States tended to the ejectment of all other nations from all right of settlement in the area south of latitude 49° N, whereas the pretensions of Great Britain only tended to the mere maintenance of her own rights in resistance to the exclusive character of the pretensions of the United States.

The statement continued: The claims of the United States were urged upon three grounds:

(1) As resulting from their own *proper* right.
(2) As the successor in title to Spain by virtue of the Treaty of Florida Blanca.
(3) As the successor in title to France by virtue of the cession of Louisiana in 1803.

The right proper was based on the alleged discovery of the Columbia by Robert Gray, on the explorations of Lewis and Clark, and on the settlement of Astoria.

[1] Reeves, *Diplomacy under Tyler and Polk*, p. 217.

The right derived from Spain was founded on the alleged prior discoveries by Cabrillo, de Fuca, Gali, and Perez. The right derived from the cession of Louisiana was founded on the assumption that, as the boundaries of that province had never been defined *longitudinally*, it might fairly be asserted to extend westward to the Pacific.

The British statement claimed that only one of the three claims could be valid. If, for example, the title of Spain by first discovery, or the title of France as the original possessor of Louisiana, were valid, *then either France or Spain possessed the country when the United States claimed to have discovered it.* If, on the other hand, the Americans were the first discoverers, Spain had no claim; and if priority of discovery constituted the title, that of France fell equally to the ground. In addition, the most approved writers on international law were agreed that mere accidental discovery, unattended by exploration—by formally taking possession—by effective occupation—by purchase or cession from the natives—constituted the lowest form of title, and that it was only in proportion as first discovery was followed by any or all of these acts that such title was strengthened.

Respecting the title derived by cession from Spain, the British statement maintained that, even if the conflicting claims of Great Britain and Spain had not been finally adjusted by the Nootka Convention[1] in 1790, nothing would be easier than to demonstrate that the claims of Great Britain established more than a parity of title either as against Spain or any other nation; whatever the title may have been prior to the convention, it was agreed that all parts of the coast not already occupied by Spain or Great Britain should be equally open to the subjects of both; with the rights conveyed to the United States by Spain by virtue of the Treaty of Florida Blanca, the United States necessarily succeeded to the limitations by which they were defined and the obligations under which they were to be exercised.

[1] 'If the Nootka convention were, as asserted (J. Q. Adams to Richard Rush) by the secretary of state, a definitive settlement of general principles of national law respecting navigation and fishery in the seas, and trade and settlement on the coasts, here mentioned, it would be difficult to resist the pretensions of the British plenipotentiaries' (Greenhow, *History of Oregon and California*, p. 341).

Respecting the third ground of claim, based upon the cession of Louisiana, the British statement said that by the cession of 1763 the territory of Louisiana belonged to Spain in 1790, when the Nootka Convention was signed, and in 1792, when Gray discovered the Columbia. If Louisiana included the disputed area south of latitude 49° N, it was necessarily included in the stipulations of the Nootka Convention. To expose the futility of this claim, however, it was only necessary to refer to the original grant to de Crozat by Louis XIV, wherein it is expressly described as 'the country drained by the waters entering, directly or indirectly, into the Mississippi.' As no tributaries of the Mississippi cross the Rockies, no portion of Louisiana could be found west of them.

The British statement said that, if the discovery of the mere entrance of the Columbia by a private American citizen constituted a valid exclusive claim to all the country between latitude 42° N and 49° N, then must any preceding discovery of the same country by an individual of any other nation invest such nation with a more valid, because a prior, claim to that country. Putting aside Drake, Cook and Vancouver, who either took possession of or touched at various points of the coast in question, in 1788 Lieutenant Meares of the royal navy, when on a trading expedition, took formal possession of the Strait of Juan de Fuca, purchased land and formed treaties with the natives, and entered the bay at the mouth of the Columbia. Meares's account of his voyage was published in 1790, two years before Gray entered the Columbia. While Gray was the first to ascertain that this bay formed the outlet of a great river, could it be seriously urged that this single step in the progress of discovery not only superseded the prior discoveries, but that it also absorbed the subsequent exploration of the river by Vancouver for near a hundred miles above Gray's 'farthest,' and also all the other discoveries, and temporary possession and occupation of harbours on the coast?

To support the extraordinary pretension built upon the limited discovery of Gray that Meares's 'bay' was the

embouchure of a river, viz., that it conferred an exclusive title to the whole basin of the river, the United States had cited various grants by European sovereigns over several parts of the American continent. Had the United States, in 1790, granted to Gray the basin of the Columbia, it would have been valid as against other citizens of the United States, but would either Spain or Great Britain have acquiesced? And, if the right of sovereignty accrued to the United States by Gray's discovery, why did not the United States protest the convention of 1790? As against the explorations of Lewis and Clark, the North-West Company of Canada had already established posts on the head-waters of the northern branch of the Columbia,[1] and from one of these parts their agent David Thompson, in 1811, descended to the mouth to ascertain the nature of the Astoria settlement.

Respecting the restitution of Fort George, the British statement said that, when the demand for its restoration was made, the British government demurred because it entertained doubts how far it could be sustained by the construction of the treaty. It was not a national possession or a military post, and it was never captured from the Americans by the British, but had been sold by the American company of its own free will. A British sloop of war arrived subsequent to this transaction and found the British company *in legal possession of their self-acquired property*. But, as in the case of Astoria, that 'not even the shadow of a reflection might be cast upon the good faith of the British government,' the latter decided to make the restoration. To prevent misapprehension as to the extent of the concession, however, the British minister at Washington was directed to inform Adams, United States secretary of state, that 'whilst this government is not disposed to contest with the American government the point of possession as it stood in the Columbia River at the moment of the rupture, *they are not prepared to admit the validity of the title of the government of the United States to this settlement.*

'In signifying, therefore, to Mr Adams the full acquiescence of your government in the reoccupation *of the limited*

[1] And on the branches south of latitude 49° N. See pp. 849-50.

position which the United States held in that river at the breaking out of the war, *you will at the same time assert, in suitable terms, the claim* of Great Britain to that territory, upon which the American settlement must be considered as an encroachment!'

'This instruction was executed verbally by the person to whom it was addressed.'[1]

In fine, the British statement maintained:

(1) The nature and extent of the rights acquired by the United States from Spain, as well as the rights of Great Britain, were fixed and defined by the Convention of Nootka, and that, in succeeding to the *rights*, the United States also succeeded to the *obligations* which it imposed. (2) Admitting the discovery of Gray, Great Britain had stronger claims, on the ground of prior discovery attended with acts of occupancy and settlement. Whether, therefore, the United States rested their claims upon the title of Spain, or upon that of prior discovery, or upon both, Great Britain was entitled to place her claims at least upon a parity with those of the United States.

In the *interior* of the disputed area British subjects had had, for many years, settlements and trading posts—on the Columbia and on its tributaries, some to the northward and some to the southward of that river—and had navigated the Columbia; whereas in the whole of the territory the citizens of the United States had not a single settlement or trading post. Great Britain offered to make the Columbia the boundary; the United States declined to accede to the proposal. Such being the result, it only remained for Great Britain to maintain the qualified rights she possessed; these rights were defined in the Nootka Convention and embraced the right to navigate the waters of those countries, to settle in them, and the right freely to trade with their inhabitants.

The statement concluded with a declaration that Great Britain would give her subjects full protection, while ready at any time to agree to a settlement that would not derogate from her rights or prejudice the advantages that her subjects then enjoyed.

[1] *American State Papers, Foreign Relations*, vi. p. 665.

Statement of the United States

The American statement declared that the Nootka Convention was merely of a commercial nature, and in no way affected the question of distinct jurisdiction and exclusive sovereignty. It was difficult to believe, on reading the treaty and recollecting in what cause the convention originated, that any other settlements could have been contemplated than such as were connected with trade with the natives; it was only as being of a commercial nature that the Nootka Convention could be positively asserted as being in force, as only the commercial treaties between Great Britain and Spain had been renewed by the treaty of July 1814. Admitting that the word 'settlement' was used in its most unlimited sense, the stipulations permitted promiscuous and intermixed settlements everywhere to the subjects of both parties, and declared such settlements made by either party in a degree common to the other—a state of things incompatible with distinct jurisdiction and sovereignty. The convention, therefore, established or changed nothing, but left the parties where it found them; leaving the question of rights, however derived, to be settled later. As Great Britain even then claimed only a right of joint occupancy, leaving the right of exclusive dominion in abeyance, it was not evident how, at the same time, it could be asserted that the pretensions of both parties were definitely set at rest, and that it was only in its text and stipulations that the title on either side was now to be traced. Commerce and settlements might be made by either party during the joint occupancy, but the right of exclusive dominion over any part of the country had not been extinguished, but only suspended, and must revive whenever that joint occupancy ceased. Whenever, therefore, a final line of demarcation became the subject of discussion, the United States had a right to appeal, in support of its claims, not only to its own discoveries, but to all rights as successors in title to France and Spain, in the same manner as if the Nootka Convention had never been made.

There were, by the usage of nations, continued the American statement, two rules regulating the right of occupation: (1) Prior discovery gave a right to occupy, if exercised within a reasonable time, and if followed by permanent settlements and by the cultivation of the soil. (2) The right derived from prior discovery and settlement was not confined to the spot so discovered or first settled. The extent of territory which would attach to such first discovery or settlement might not, in every case, be precisely determined, but it had been generally admitted that the first discovery and subsequent settlement, within a reasonable time, of the mouth of a river, particularly if none of its branches had been explored prior to such discovery, gave the right of occupancy, and, ultimately, of sovereignty, to the whole area drained by such river.

The American statement contended that, in the past, Great Britain had not considered her charters as valid only as against her own subjects, and, by excepting from the grants lands already occupied by the subjects of other civilized nations, it was clearly implied that they were intended to exclude all other persons and nations. Not only had the whole country between Hudson Bay and Florida draining into the Atlantic been occupied and held by these charters, but the principle had been extended beyond the sources of these Atlantic rivers. Thus, the rights of the Atlantic colonies to extend beyond the Alleghanies, notwithstanding the prior French settlements, had been effectually and successfully enforced. While the two general rules which had been mentioned might often conflict, it was the peculiar character of the claim of the United States that it was founded on both principles, which, in this case, united both in its support and converted the claim into an incontestable right. In different hands the several claims would have conflicted one with another, but united in the same power they supported each other. The possessors of Louisiana might have contended for the territory on the ground of contiguity. The several discoveries of the Spanish and American navigators might separately have been considered as so many *steps in the progress of discovery*, and

giving only imperfect claims to each party. All those various claims were now brought united against the pretensions of any other nation.

Respecting the title derived from the cession of Louisiana, the American statement maintained that the actual possession and populous settlements of the valley of the Mississippi constituted a strong claim to the westwardly extension of that province over the contiguous vacant territory as far as the Pacific. Crozat's grant was only for part of the province of Louisiana. It was bounded on the west by New Mexico and on the north by the Illinois. The grant did not include any branches north of the Missouri, the sources of which were not supposed to extend north of latitude 42° N. All the territory north of 42° N was included in the government of New France, which on the most authentic French maps extended over territory draining into the South Seas. In 1717 the Illinois was annexed to Louisiana, and from that time the latter extended as far as the most northern limit of the French possessions in North America,[1] and thereby west of New France. The limits between British and French territories in that quarter were settled by the Treaty of Utrecht,[2] the line of demarcation following the 49th parallel.

The American statement contended that the United States had an undoubted right to claim, by virtue of the Spanish discoveries and of their own. It stated that prior to Cook's voyage Perez had, in 1774, discovered Nootka Sound[3] and sailed to 55° N, discovering Dixon entrance; that Quadra had, in 1775, explored the coast from 42° N to 54° N[4]; and that, in Spanish voyages of subsequent date, the coast was explored as far as 60° N. Juan de Fuca Strait was discovered in 1787 by Barkley. Meares and Vancouver failed to discover the Columbia. It was entered by Gray, who ascended it for

[1] All the territory between the basin of the Mississippi and the Hudson's Bay Company's territories formed part of New France.

[2] Limits were not settled. See pp. 887-91.

[3] There is no evidence that Perez sighted Nootka Sound, and he reached latitude 54° N, not 55° N. Later Spanish expeditions reached 58° N, not 60° N. The effect on title was much diminished by the non-publication of these voyages till after Cook's reports had been published.

[4] Quadra did not explore the coast between 48½° N and 54° N.

twenty miles. The discovery of Gray[1] was called by the British negotiators only a *step* in the progress of discovery, and they also attempted to divide its merit between him, Meares, and Vancouver's officer: Meares had not suggested nor suspected the existence of a river; Vancouver's lieutenant had not the slightest share in the discovery. In 1805 Lewis and Clark had explored the Columbia from its most eastern source to the mouth. Thus was the discovery of the river commenced and completed by the United States before any settlement had been made on it or any of its branches explored by any other nation.[2] Even if Thompson had, in 1805, reached one of the sources of the Columbia north of 50° N, it could not be seriously contended that this, compared with the complete American exploration, would give to Great Britain 'a title to parity, at least, if not priority of discovery, as opposed to the United States.' In 1811 the American establishment of Astoria[3] was commenced near the mouth of the river, before any British settlement had been made south of the 49th parallel.[4] As Astoria was seized during the war, it was formally restored in conformity with the Treaty of Ghent.[5]

[1] 'That the discoverer of the mouth of a river is entitled to the exclusive use of the river' and that 'the exclusive use of the river entitles him to the property of its banks . . . is an inversion of the ordinary principles of natural law, which regards rivers and lakes as appendages to a territory, the use of which is necessary for the perfect enjoyment of the territory, and rights of territory in them only as acquired through rights of property in the banks' (Twiss, *The Oregon Question Examined*, p. 279).

[2] In 1800 Duncan McGillivray discovered the Blaeberry River, a branch of the Columbia. Prior to the establishment of Astoria the North-West Company had built Fort Kootanae north of latitude 49° N, and four posts—Kootenae Falls, Kullyspeel House, Saleesh House and Spokane House—south of it: all within the basin of the Columbia.

[3] Concerning the claim that Astoria—an insignificant trading house erected at the mouth of a great river like the Columbia—carried with it the title of the whole basin of that river, it can safely be said that its moderation was at least questionable. To reduce the contention to an absurdity, it is only necessary to apply the same theory to mighty rivers like the Mississippi and Amazon.

[4] As already stated, the British North-West Company had, prior to the erection of Astoria, at least four posts south of latitude 49°.

[5] 'It is manifest that the restoration of Astoria under the treaty, according to the view for which Bayard had so earnestly contended, was wholly inconclusive as to rights of sovereignty over the mouth of the Columbia. The question of possession before the war was one of fact, and this the United States was not slow to raise' (Reeves, *Diplomacy under Tyler and Polk*, p. 208).

With the various dispatches to and from the officers of the British government the United States had no concern ; the only written document known to be in the possession of the United States was the act of restoration itself, which contains no exception, reservation or protest whatever.

In fine, the American statement maintained : that the United States claimed it had first discovered the Columbia ; that the discovery had been attended by simultaneous occupation and possession and by subsequent settlements, which had been interrupted only by war. This gave a right to the whole country drained by that river, which right, strengthened by other Spanish and American discoveries along the coast, established a stronger title, at least as far north as latitude 49° N, than had ever been before asserted by any nation to vacant territory. As its exclusive title originated in Gray's discovery in 1792, the United States had no motive for protesting the Nootka Convention in 1790. Respecting the formality called 'taking possession' of a country inhabited by Indians who have no notion of 'sovereignty,' the American plenipotentiary abstained from making any remarks. Respecting the trading posts of the North-West Company of Canada, they were only established after the United States title was completed, and, as they were factories unaccompanied by cultivation and permanent settlement, they could not give a good title.[1]

Viewed as a matter of mutual convenience, and to avert, by a definitive line of limitation, any possible cause of collision, the American statement said that every consideration connected with the subject should be allowed its due weight. After paying due regard to the British discoveries, the line of demarcation offered would sacrifice a portion of the United States just claim. Under whatever sovereignty the disputed area might be placed, it would be almost exclusively peopled from the United States. But three nations, Great Britain, the United States and Spain, had the right to colonize the territory. The United States, having purchased the rights of Spain, were fairly entitled to two shares.

[1] Neither better nor worse than Astoria, except that their occupation was continuous, whereas Astoria was very short-lived.

No settlement, however, was arrived at, and the convention of 1827 extended the joint occupation indefinitely.

Occurrences, 1820 to 1840

In 1821 the rivalry between the North-West and Hudson's Bay Companies was ended by the merging of the former in the latter. In the same year an imperial act was passed extending the jurisdiction of the courts of Upper Canada over British subjects in 'other parts of America, not within the limits of either of the provinces of Upper or Lower Canada, or of any civil government of the United States.'

In 1821 a committee of Congress recommended a bill for the 'occupation of the Columbia and the regulation of the trade with the Indians in the territories of the United States,' [1] but no action was taken on this report. In President Monroe's message, December 2, 1823, he declared that the occasion had been judged proper for asserting that 'the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers.' [2]

In 1824 General Jessup, in answer to a request from a select committee of Congress, sent a letter recommending the erection of forts at the mouth of the Columbia and at intermediate points between Council Bluffs and the Pacific.[3]

President Monroe in 1824 and President Adams in 1825 recommended the establishment of a military post at the mouth of the Columbia. No action was taken, however.

On August 6, 1827, a convention was signed extending

[1] 'The terms of the bill are directly at variance with the provisions of the third article of the convention of October 1818, between the United States and Great Britain; as the Columbia could not possibly be *free and open to the vessels, citizens, and subjects of both nations*, if it were *occupied* by either' (Greenhow, *History of Oregon and California*, p. 332).

[2] *Messages and Papers of the Presidents*, ii. p. 209. 'Against this declaration, which—however just and politic might have been the principle announced—was unquestionably imprudent, or at least premature, the British and the Russian governments severally protested' (Greenhow, *History of Oregon and California*, p. 336).

[3] 'Another publication, equally impolitic on the part of the American government' (Greenhow, *History of Oregon and California*, p. 336).

the joint occupation indefinitely, but subject to termination on twelve months' notice by either party.

In 1828 a bill was introduced into Congress authorizing the president to establish forts, make explorations and extend the jurisdiction of the United States over the territory west of the Rockies between the parallels of 42° N and 54° 40′ N. The bill was finally rejected in January 1829.

The merging of the North-West Company in the Hudson's Bay Company in 1821 proved highly advantageous to the latter. Great efforts were made to obtain a monopoly, and so successful were they that the Americans were forced to abandon the fur trade in the interior and to withdraw their vessels from the coasts. Competitors were either driven out of the market by goods being offered to the Indians at much lower prices than the Americans could afford to take, or were taken into the company's service.

In 1842 Lord Ashburton arrived at Washington. He had specific instructions for the settlement of the Oregon boundary as well as other differences between Great Britain and the United States, but the Maine boundary was more pressing, and Webster feared that if an attempt to settle both boundaries were made, the whole of the negotiations would fall through. In his message of December 6, 1842, President Tyler said that he would 'not delay to urge on Great Britain the importance'[1] of the early settlement of the controversy.

Though no action had been taken, and though Lord Aberdeen had, in the following August, again urged that negotiations be initiated, President Tyler, in his messages of December 23, 1842 and of December 5, 1843, referred to the negotiations in the same inexact language.[2]

[1] Lord Aberdeen wrote Fox that the British government had 'observed with surprise and regret a paragraph in the President's late message to Congress, which, if not directly at variance with fact, is at least calculated to mislead. . . . It would have been more candid had he also stated that he had already received from the British government a pressing overture to negotiate an adjustment of differences with respect to the Oregon Territory,' and that he had responded to that overture in the same conciliatory spirit in which it had been made (Blue Book, *Correspondence relative to the Oregon Territory*, p. 3).

[2] 'The inference drawn from the President's expressions by all who are unacquainted with the real state of the case . . . must still be, that the President

In 1844 John C. Calhoun became United States secretary of state. As he had, in the previous year, advocated a policy of 'wise and masterly inactivity,' he opposed any proposition for the occupation of Oregon on the ground that it would precipitate war with Great Britain. He adopted Gallatin's [1] idea that time was fighting on the side of the United States. Though his views were not changed, he was 'peremptorily ordered' to negotiate with Pakenham and to endeavour to effect a settlement on the line of the 49th parallel. Pakenham, however, refused to concede the territory north of the Columbia. In November 1844 Lord Aberdeen instructed Pakenham to propose arbitration, but before he could do so Tyler sent a message to Congress recommending the establishment of military posts across the continent, and the extension of the federal laws to protect Americans in the Oregon. On January 21, 1845, Calhoun declined the offer of arbitration on the ground that it 'might rather retard than expedite its final adjustment.'

In May 1844 the Democratic convention met at Baltimore. One plank in their platform was popularly translated 'Fifty-four-forty or fight'—latitude 54° 40′ being the initial point of the boundary between Russian America and the Oregon territory. Knowing the opposition of the North to any extension of slave territory, and being determined to annex Texas, the Democrats saw in Oregon a counterpoise to Texas and an area that, owing to difficulty of access, would be peopled much more slowly. On this platform Polk was elected.

In his inaugural message, March 4, 1845, President Polk stated it would become his duty to 'assert and maintain by all constitutional means the right of the United States

has been occupied in urging upon Her Majesty's Government an early settlement of the Oregon Question; and that Her Majesty's Government, on their part, have either been inattentive to the urgency of the question, or reluctant to proceed to an adjustment of it' (Fox to Aberdeen, *Correspondence relative to the Oregon Territory*, p. 6).

[1] In 1826 Gallatin wrote Clay that, as Great Britain considered the territory as open to the first occupant, all 'that the United States might want was the very object which Great Britain declared to be hers, viz., the preservation of peace until . . . the whole country was occupied' (*American State Papers, Foreign Relations*, vi. p. 680).

to that portion of our territory which lies beyond the Rocky Mountains. Our title to the country of the Oregon is clear and unquestionable.' Pakenham again urged arbitration, hoping the new administration might reverse Tyler's decision. In July James Buchanan, United States secretary of state, proposed the 49th parallel to the Pacific, any port or ports on Vancouver Island south of that parallel to be made free to Great Britain.

Pakenham flatly declined the proposal, and expressed the hope that the United States would offer some further proposal 'more consistent with fairness and equity, and with the reasonable expectations of the British Government.' Polk then withdrew his proposition, and proposed to claim the whole territory.[1] Buchanan was anxious to continue the negotiation, but Polk opposed, believing that there was no probability of adjusting the subject. Upon learning Polk's attitude Pakenham withdrew a conciliatory note that he had delivered. In his message, December 2, 1845, Polk stated that he had withdrawn his offer of a compromise and that the title of the United States 'to the whole Oregon Territory' had been 'asserted, and, as is believed, maintained by irrefragable facts and arguments.'[2] Late in December Buchanan told Polk that the next two weeks would mean peace or war. In January 1846 Louis McLane, United States minister at London, reported that Great Britain

[1] 'The only way to treat John Bull,' said Polk to a South Carolina member of Congress, 'was to look him straight in the eye. I considered a bold and firm course on our part the pacific one' (Polk's *Diary*, January 4, 1846).

[2] 'It was certainly an unusual thing—perhaps unprecedented in diplomacy—that, while negotiations were depending . . . one of the parties should authoritatively declare its right to the whole matter in dispute, and show itself ready to maintain it by arms. The declaration in the inaugural had its natural effect in Great Britain. It roused the British spirit as high as that of the American. . . . The new administration felt itself to be in a dilemma. To stand upon 54-40 was to have war in reality; to recede from it, might be to incur the penalty laid down in the Baltimore platform. . . . The secretary [Buchanan] seemed to expect some further proposition from the British government; but none came. The rebuff in the inaugural address had been too public, and too violent, to admit that government to take the initiative again. It said nothing; the war cry continued to rage; and at the end of four months our government found itself under the necessity to take the initiative, and recommence negotiations as the means of avoiding war' (Benton, *Thirty Years' View*, ii. pp. 661-2).

was making extensive preparations for war. Polk announced that, while he stood for 'fifty-four degrees forty minutes,' he would refer any suitable proposition to the Senate—a hint that an offer of forty-nine degrees would be accepted. On April 28 Polk gave notice of the abrogation of the joint occupation convention, and, when transmitting it, Buchanan invited the British government to make a proposal for a settlement. Knowing that Polk would accept, Lord Aberdeen instructed Pakenham to offer the 49th parallel, reserving to Great Britain the whole of Vancouver Island and the navigation of the Columbia.

The Oregon Treaty

On June 15, 1846, Richard Pakenham, on the part of Great Britain, and James Buchanan, on the part of the United States, signed at Washington the so-called Oregon Treaty.

Article I defined the boundary as following the 49th parallel from the Rockies to 'the middle of the channel which separates the continent from Vancouver's Island ; and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean : Provided, however, that the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties.'

Article II provided for the free navigation of the Columbia River. Articles III and IV provided that the possessory rights of the Hudson's Bay and Puget's Sound Agricultural Companies should be respected and that, if possession of their lands were desired by the United States, they should be transferred to the said government at a proper valuation.

Before the treaty was signed Polk referred it to the Senate. In the message accompanying it he said, that, as the Senate was not only 'a branch of the treaty-making power,' but also 'of the war-making power,' it was proper to take the advice of that body in advance upon a question which might involve the issue of peace or war.[1] In endea-

[1] 'Thus he evaded all responsibility for the compromise line. He made it appear that the proposal for such a settlement came wholly from Great Britain. It was true that the *official proposal* did so come, but not until Polk had let it be

vouring to effect a settlement he was much hampered by his own utterances and by the Baltimore platform that had carried him into power. While nominally insisting on the extreme claim, he endeavoured to prepare the public mind for a recession to 49° N. Haywood and Benton,[1] senators friendly to the president, contended that the president was not so far committed against the latter that he could not form a treaty upon it. Eventually the Senate ratified it, the Whigs and moderate Democrats outvoting the extremists of the latter party.

Settlement in the Disputed Area

Before discussing the settlement it is necessary to glance briefly at the development of the disputed area prior to the signing of the treaty.

The first serious attempt to bring land under cultivation was made in 1828, in the Willamette Valley, by time-expired servants of the Hudson's Bay Company. In 1834 Methodist missionaries established themselves in the same region. Although assisted by Dr John McLoughlin, the governor of the Hudson's Bay Company in the territory west of the Rockies, they opposed the company, and plotted to deprive McLoughlin of his prior claim to the water-power at the falls of the Willamette.[2]

understood by Aberdeen and Pakenham that he would not reject it. He cast upon the Senate the responsibility for the compromise, warning them, however, that its rejection might mean war' (Reeves, *Diplomacy under Tyler and Polk*, p. 263).

[1] Benton, in his speech, heaped ridicule upon the 'Fifty-four-Forties,' as he dubbed the extremists. He said: 'Russia is not there, bounding us on the north, yet that makes no difference in the philosophy of our Fifty-four-Forties, who believe it to be so; and, on that belief, are ready to fight. Their notion is, that we go jam up to 54° 40′, and the Russians come jam down to the same, leaving no place for the British lion to put down a paw, although that paw should be no bigger than the sole of the dove's foot which sought a resting-place from Noah's ark. This must seem a little strange to British statesmen, who do not grow so fast as to leave all knowledge behind them' (Benton, *Thirty Years' View*, ii. p. 669).

[2] 'Such were the methods by which the members of the Methodist Mission exhibited their hostility to the man who had pursued one unvarying course of kindness to them and their countrymen for eight years with no other cause than their desire to deprive him of a piece of property which they coveted' (*Bancroft's Works*, xxix. p. 210).

Linn introduced into the Senate in 1842 a bill authorizing the adoption of measures for the occupation and settlement of Oregon and for the exercise of jurisdiction therein. The discussions in Congress and the missionary efforts resulted in a pronounced immigration. In 1843 one thousand immigrants arrived and were relieved by McLoughlin. The general condition of the new colonists was one of destitution. They were 'people of pronounced character, rudely arrogant and aggressive.' In 1844 fourteen hundred people crossed the plains. The condition of these immigrants on arrival at their destination was worse than that of the immigrants of 1843.

In 1845 three thousand persons arrived, doubling the white population. In 1841 an attempt was made to form a provisional government. In 1843 a legislative committee was appointed, and laws respecting the judiciary and land were adopted. In 1845 a legislative committee approached McLoughlin and proposed that he should unite the Americans in the government compact. It was urged that this action would secure the property of the company and conduce to the maintenance of peace and order. McLoughlin yielded, and on August 15, 1845, with his lieutenant, James Douglas, consented to become a party to the articles of compact. Bancroft says that he deemed it prudent to yield, as in June he had received from the company in London 'a communication informing him that in the present state of affairs the company could not obtain protection from the government, but it must protect itself the best way it could.' He must also have been influenced by the expectation that his action would enable him to hold the land that he had taken up.

A few days after McLoughlin and Douglas had given their adhesion to the provisional government, Captain Park, R.N., and Lieutenant Peel, R.N., son of Sir Robert Peel, arrived. The former brought a letter from Admiral Seymour, commanding the British squadron in the Pacific, informing McLoughlin that he would afford protection to British subjects in Oregon. This was undoubtedly the turning-point in the dispute. Not only did Park and Peel report this fatally compromising action by the chief representatives of the Hud-

son's Bay Company, but McLoughlin assured them and even wrote to England that the country 'was not worth a war.'

Largely through McLoughlin's assistance there were, in 1846, about 7000 American settlers as compared with only 400 British, outnumbering the latter by eighteen to one. The remarks of Warre and Vavasour, though not received by the British government till after the treaty was signed, indicate the state of affairs in Oregon viewed from a British standpoint.[1] Lieutenant Peel arrived in London in February 1846, bearing the report of Captain Gordon, brother of Lord Aberdeen. Gordon's[2] report also censures the Hudson's Bay Company.

Review of the Settlement

The settlement, under the existing conditions, was a fair and reasonable one. It concluded differences that had, on several occasions, brought the two countries to the verge

[1] 'Whatever may have been the orders, or the motives of the gentleman in charge of the Hudson's Bay Company's posts on the west of the Rocky Mountains, their policy has tended to the introduction of the American settlers into the country.

'We are convinced that without their assistance not 30 American families would now have been in the settlement.

'The first immigrations, in 1841 or 1842, arrived in so miserable a condition, that, had it not been for the trading posts of the Hudson's Bay Company, they must have starved, or been cut off by the Indians. . . . The agents of the Hudson's Bay Company gave every encouragement to their settlement, and goods were forwarded to the Willamette Falls, and retailed to these citizens of the United States at even a more advantageous rate than to the British subjects.

'Thus encouraged, emigrations left the United States in 1843, 1844 and 1845, and were received in the same cordial manner.

'Their numbers have increased so rapidly that the British party are now in the minority, and the gentlemen of the Hudson's Bay Company have been obliged to join the organization, without any reserve except the mere form of the oath of office. Their lands are invaded—themselves insulted—and they now require the protection of the British government against the very people to the introduction of whom they have been more than accessory' (*Documents relative to Warre and Vavasour's Military Reconnaissance in Oregon*, 1845-6; *Quarterly of the Oregon Historical Society*, x. pp. 81-2).

[2] Gordon is reputed to have been so disgusted because the Columbia salmon would not rise to a fly, that he reported that 'the country was not worth a damn.' Bancroft (xxix. p. 499) says 'not worth a war,' but the former is the commonly accepted version. The story, however, rests upon no certain basis, and is, almost certainly, one of the numerous crop of fables current respecting each and every boundary dispute.

of war, but, of course, was not satisfactory to the extremists of either party in Oregon. It was not satisfactory to the pro-American party, inasmuch as they were not conceded the right to seize without compensation the property of the Hudson's Bay and Puget's Sound Companies; it was not satisfactory to the Hudson's Bay Company, inasmuch as they foresaw that, with an antagonistic territorial government and populace, the monopoly of the trade would soon pass from them. The attitude of Great Britain throughout was a dignified one, ignoring the petulance and unreasonable claims of the Americans,[1] conceding that the United States had certain rights and being prepared to offer a boundary that was equitable and even generous; willing to make concessions such as ports on Puget Sound and free access thereto, but, until overwhelmed by the immigration from the United States, standing by the Columbia River as an irreducible minimum. It must be borne in mind, also, that in this matter the government of Great Britain was in great part merely supporting the Hudson's Bay Company. The action of McLoughlin, the virtual governor of the great North-West, in joining the provisional government fatally compromised the company, and it is by no means a matter for surprise that, after Gordon's report had been received, Lord Aberdeen decided to abandon the British claim to the mainland south of latitude 49° N. If the Hudson's Bay Company was content to accept the existing government—so strongly pro-United States that annexation to, or absorption by, that country was only a question of time—is it surprising that British diplomats concluded a treaty that apparently conserved the interests of the company so far as they themselves, apparently, desired them conserved?[2] Canadians are prone to accuse

[1] 'The company [Hudson's Bay Co.] in Oregon, held that . . . in the settlement the United States had been treated by England, whose people could afford it, much as a kind parent treats a wayward child. And in this they were right; for had England been as unreasonable, overbearing, and insulting as the people of the United States, there assuredly would have been war' (*Bancroft's Works*, xxix. pp. 596-7).

[2] Reeves, in his *Diplomacy under Tyler and Polk*, pp. 263-4, sums up as follows: 'Polk had looked John Bull firmly in the eye, and John Bull proposed

Great Britain of sacrificing *Canadian territory*, forgetting that in 1846 Canada did not exercise jurisdiction in the western half of the continent, and that, had any one predicted that in a quarter of a century Canada would extend from ocean to ocean, he would have been regarded as an irresponsible visionary.

The dispute was virtually settled on the principle that 'effective occupation' constitutes an unassailable title. It is also interesting to note that the division of territory was practically based on the 'Hinterland' [1] idea—nearly forty years before that doctrine was put forward as a principle of international law. That it was the part of wisdom to effect a settlement was demonstrated ten years later, when the Fraser River gold rush resulted in an influx into British Columbia of thousands of American miners and of the undesirable class of citizens who accompany such 'rushes.'

what he had so often refused. But was Polk's firmness the cause of the peaceful and fair settlement? Had Palmerston been in Aberdeen's position at the time of Polk's "firm" pronouncement, Polk might have lost Oregon. That the Oregon question was settled in the manner it was is one of the glories of the administration of Sir Robert Peel. Aberdeen's large-mindedness and consistent belief that the friendship of the United States was worth much more to Great Britain than a few degrees of latitude on the Pacific coast are responsible for the settlement that Polk thought to gain by a firm policy. That Aberdeen was "bluffed" by Polk is absurd. Peel knew that he could not retain office after the repeal of the Corn Laws, and it was the part of great statesmanship not to leave to his successors in office an *impasse* that had been brought about during his administration. Peel could not go into opposition with a war of his own creation upon his hands. He would not aggravate the warlike feelings of England for the purpose of maintaining his hold upon office. McLane was correctly advised of Peel's attitude when Aberdeen sent Pakenham his instructions to propose the compromise line. He wrote to Buchanan that Peel's ministry would resign before the end of June, and that in case the new proposals were not accepted promptly, the new ministry might not agree to as favourable terms. Upon the day that the Peel administration resigned, news came that the United States had agreed to Aberdeen's offer of settlement, and the second great boundary controversy with the mother-country was at an end.'

[1] Richard Olney, United States secretary of state, in a communication to Sir Julian Pauncefote, June 22, 1896, stated that 'It can not be irrelevant to remark that "spheres of influence" and the theory or practice of the "Hinterland" idea are things unknown to international law and do not as yet rest upon any recognized principles of either international or municipal law. They are new departures which certain great European powers have found necessary and convenient in the course of their division among themselves of great tracts of the continent of Africa, and which find their sanction solely in their reciprocal stipulations' (Moore, *A Digest of International Law*, i. pp. 268-9).

It is not too much to say that, had it occurred before the treaty of partition was signed, the province would probably have been lost to the British crown.

San Juan Controversy

Hardly was the ink on the Oregon Treaty dry before differences arose respecting the identity of the 'channel which separates the continent from Vancouver's Island.' The British government claimed the eastern channel, Rosario Strait, and the United States contended for the western channel, Haro Strait.

Attempts were made to settle the question by negotiation, but were unsuccessful. Meanwhile settlers were occupying the territory, and the consequent danger of collisions was steadily increasing. In 1848 Crampton, British minister at Washington, proposed 'to the Government of the United States to name a Joint Commission for the purpose of marking out the north-west boundary; and more particularly that part of it in the neighbourhood of Vancouver's Island.' In 1856 Crampton repeated his proposal. To this the United States government assented. Captain James C. Prevost, R.N., and Captain George H. Richards, R.N., were appointed commissioner and second commissioner respectively on the part of Great Britain, and Archibald Campbell was appointed commissioner on the part of the United States. At their first meeting, June 27, 1857, they exhibited their respective commissions. Campbell's instructions empowered him to determine the boundary-line from the summit of the Rockies to the Pacific, whereas Captain Prevost's powers were limited to the determination of the water boundary.[1]

They held six meetings, but failed to arrive at an agreement. The British commissioner contended that the channel mentioned should possess three characteristics:

'1. It should separate the continent from Vancouver's Island; 2. It should admit of the boundary line being

[1] For details of the conferences between Prevost and Campbell see *British and Foreign State Papers*, lv. pp. 1211-88.

carried through the middle of it in a southerly direction. 3. It should be a navigable channel.' He admitted that the Haro Strait was navigable, but contended that, from the rapidity and variableness of its current and lack of anchorages, it would generally be avoided by sailing vessels, which would prefer Rosario Strait, a waterway used by the Hudson's Bay Company since 1825. He argued that the Haro Strait did not separate the 'continent from Vancouver's Island,' the continent already having been separated from that island by another navigable channel—Rosario Strait; that a line drawn through Haro Strait must proceed for some distance in a westerly direction, whereas the treaty required that it should proceed in a southerly direction; and that, although there were islands east of Rosario Strait, there was no navigable channel between them and the continent.

The American commissioner claimed that Haro Strait was the deepest and widest of the channels connecting Juan de Fuca Strait and the Gulf of Georgia, and was the one usually designated on the maps in use at the date of the treaty. Other channels merely separated islands from each other; Haro Strait, since it washed the shores of Vancouver Island, was the only one that separated the island from the continent. The word 'southerly' was only used in the treaty as opposed to 'northerly,' and was used with reference to the line through Juan de Fuca Strait, where it runs about west-north-west. He argued that contemporary evidence demonstrated that Haro Strait was proposed by Great Britain and accepted by the United States, and quoted the correspondence of American authorities as to their understanding of the article. He said that the only claim by Great Britain that Rosario Strait was intended was contained in the note of Crampton to James Buchanan, of January 13, 1848, and that the claim that Rosario Strait was the only one that had been surveyed and used was obviously erroneous, as Haro Strait had been surveyed and used by Spain and the United States.

In reply the British commissioner stated that McLane and Benton, quoted by Campbell, were not the actual negotiators of the treaty; that McLane merely said that the proposition would 'most probably' be made; that it was

not made, and that the failure to name it was evidence that Haro Strait was not intended. He quoted Preuss's map of Oregon and Upper California, published in 1848, and 'a diagram of a portion of Oregon Territory,' by the surveyor-general of Oregon, dated October 21, 1852. In both maps the boundary was drawn through Rosario Strait. He further said that he had been officially informed 'by high and competent authority'[1] that Rosario Strait was the channel contemplated by the British government in the treaty.

The American commissioner, in reply, stated that Preuss's map was inaccurate, and that neither it nor the surveyor-general's map had any official relation to the boundary question. He quoted Arrowsmith's map of 1849, in which Haro Strait was indicated as the boundary. He also adverted to the fact that the Earl of Clarendon did not disclose the authority upon which his statement was based.

The British commissioner then offered, without prejudice, a compromise line which would give San Juan Island to Great Britain, and the other islands, Orcas, Lopez, etc., to the United States. Though this offer would have conceded two-thirds of the area, the United States commissioner refused to entertain it. This offer was made in accordance with special instructions to Captain Prevost, instructions which were not exhibited in the first instance to Campbell. It was therein stated that a 'middle' line would pass just eastward of the Matia group, and being prolonged from thence nearly due south would pass through Rosario Strait into Juan de Fuca Strait. It appeared, it was said, that this line was so clearly and exactly in accordance with the terms of the treaty that it might be hoped the American commissioner would accept it, but, if he refused it, the British commissioner was at liberty to adopt any other intermediate channel that was 'substantially in accordance with the description of the Treaty.'[2]

In 1859 a pig belonging to the Hudson's Bay Company

[1] Earl of Clarendon, secretary for Foreign Affairs.

[2] Blue Book, *North-West American Water Boundary*, Reply of the United States . . . presented to His Majesty the Emperor of Germany, p. 41.

was shot by an American citizen on San Juan—one of the islands in dispute. On the strength of a statement by the American that an officer of the company had threatened to arrest him and take him to Victoria for trial—which was denied by the officer—General Harney, commanding Oregon district, landed United States troops on the island; a redoubt was constructed, and, but for the forbearance of Admiral Baynes, war would have been precipitated by General Harney and some of his 'fire-eating' officers. This action was promptly protested by Great Britain, and General Scott was instructed to proceed to Washington Territory and arrange a *modus vivendi*. An arrangement for a joint occupation by one hundred British and one hundred United States troops was concluded.

During 1859 and 1860 several fruitless attempts were made by the British government to induce the United States to refer the question to arbitration. On January 14, 1869, Lord Clarendon and Reverdy Johnson concluded a convention for arbitration by the president of the Swiss Confederation, but the United States Senate failed to ratify it. In 1871 an attempt was made to settle the question by the Joint High Commission, but without success, the American commissioners declining the British offer of the compromise line.

By Articles XXXIV to XLII of the Treaty of Washington, May 8, 1871, it was provided that the respective claims of Great Britain and the United States to Rosario Strait and Haro Strait should be submitted to the arbitration and award of the German Emperor, who should 'decide thereupon finally and without appeal which of those claims is most in accordance with the true interpretation of the treaty of June 15, 1846.' Owing to the contentious attitude assumed by the United States, this question was one of the most troublesome that the Joint High Commission had to deal with, and 'came near precipitating an unsuccessful termination of its labours.'

The case for Great Britain was prepared by Admiral James C. Prevost, and the case for the United States by George Bancroft, United States minister at Berlin. The United States case was delivered at the Foreign Office,

Berlin, on December 12, 1871, and the British case on the 15th. The second statement of Great Britain was presented on June 10, 1872, and that of the United States on the 11th.

Award of the German Emperor

On October 21, 1872, the emperor rendered his award that the claim of the United States for Haro Strait was 'most in accordance with the true interpretations of the treaty' of 1846.

The British government was severely criticized for agreeing to limit the arbitration to the Rosario and Haro channels instead of asking the arbitrator to determine which channel was meant in the treaty.[1] As insisting upon it might have wrecked the whole treaty, the criticism was not justified, though such a reference would probably have given Great Britain San Juan and Waldron, leaving Orcas and Lopez to the United States.

The arguments and the evidence adduced by the contending parties show that the evidence by both sides was of an inconclusive nature, and, in general, consisted of *ex parte* interpretations of discussions and correspondence. The Oregon Treaty was concluded hastily, both nations fearing that actions of its subjects would precipitate a conflict; and there is no reason to believe that the negotiators intended the boundary to be drawn elsewhere than is stated in the treaty, viz., 'the middle of the channel which separates the continent from Vancouver's Island.' An examination of the chart shows that the 'mid-channel' line follows approximately the compromise line offered by the British

[1] Earl de Grey, in the House of Lords, June 12, 1872, in defending the Treaty of Washington, said that the Earl of Derby adopted an easy mode of criticizing the treaty in respect of questions which he did not desire to discuss by merely declaring that they were of no importance and that they could be settled with the utmost facility. 'My noble friend,' said Earl de Grey, 'took as an instance the case of the island of San Juan; but so far from that question being settled with the utmost facility, it was one of those which caused us the greatest trouble. The United States commissioners raised great difficulties on the subject, and we were obliged to insist strongly upon the views of Her Majesty's Government with respect to it' (Hansard, ccvi. 1865; quoted in Moore's *International Arbitrations*, i. p. 227).

commissioners, except that it would have been more favourable to Great Britain as regards some of the small islands.

On March 10, 1873, a protocol was signed at Washington, by Sir Edward Thornton and Admiral Prevost on the part of Great Britain, and by Hamilton Fish on the part of the United States. The boundary-line was drawn on four identical charts and was defined by a series of courses from the mainland to the Pacific.

Hudson's Bay Company Claims

In the portion of the territory that fell to the United States in 1846 the Hudson's Bay Company had thirteen establishments, and the Puget's Sound Agricultural Company —an accessory organization—two. After the passage of the act establishing the territory of Oregon the companies found their position increasingly precarious. They were harassed by peculiar constructions of the revenue laws ; their cattle were shot by travellers, as game ; the lands surrounding the Hudson's Bay Company's forts and the Puget's Sound Company's farms were covered by American squatters, on the ground that the possessory rights of the company would expire with their charter ; they were refused reparation when they appealed to the courts ; the right to navigate the Columbia was rendered valueless by the interpretation that the words 'on the same footing as citizens of the United States' permitted the levying of customs dues on merchandise imported for trade. The companies finally offered to dispose of their interests to the United States.

On July 1, 1863, a treaty 'for the final settlement of the claims of the Hudson's Bay and Puget's Sound Agricultural Companies' was signed at Washington by Lord Lyons and William H. Seward. It provided for the appointment by each government of a commissioner 'for the purpose of examining and deciding upon all claims' arising out of the provisions of the treaty of 1846. It further provided for the appointment of an umpire—to be chosen by the commissioners. Sir John Rose was appointed commissioner on the part of Great Britain, and Alexander S. Johnson on

the part of the United States. Benjamin R. Curtis was selected as umpire.

The Hudson's Bay Company claimed £879,850 or $4,321,937, and the Puget's Sound Agricultural Company £240,000 or $1,168,000. On September 10, 1869, the commissioners rendered their award. They awarded the Hudson's Bay Company $450,000 and the Puget's Sound Agricultural Company $200,000 'as the adequate money consideration for the transfer to the United States of America' of all their possessory rights and claims.

Surveys of the Boundary

Article 1 of the Oregon Treaty, 1846, provided for the appointment of a commissioner and a chief astronomer by each of the subscribing governments, to mark and determine the boundary-line between the summit of the Rockies and the Strait of Georgia. In 1857 Archibald Campbell was appointed commissioner, and Lieutenant John G. Parke chief astronomer, on the part of the United States. In 1858 Colonel J. S. Hawkins, R.E., was appointed first commissioner, and Captain George H. Richards, R.N., as second commissioner and chief astronomer, on the part of Great Britain. In view of the great expense involved in marking the whole boundary, the commissioners decided to determine it only at stream crossings, settlements, etc., by astronomical observations, and to mark the line in the vicinity of the observation stations. Of the 410 miles 190 miles were cleared and marked. The field work closed late in 1860 or early in 1861.

In 1870 it was discovered that 'the commonly-received boundary line between the United States and the British possessions' at Pembina was 4700 feet south of the 49th parallel. In 1872 Major D. R. Cameron, R.A., was appointed commissioner on the part of Great Britain, and Captain S. Anderson, R.E., chief astronomer. On the part of the United States, Archibald Campbell and Colonel Farquhar were appointed commissioner and chief astronomer respectively. In 1873 Colonel Farquhar was succeeded by

Captain W. J. Twining. The field work was completed in 1874 and the final proceedings were signed on May 29, 1876.

The treaty between Great Britain and the United States signed at Washington, April 11, 1908, provided for the demarcation of the boundary between Canada and the United States. Wm. F. King was appointed commissioner on the part of Great Britain, and O. H. Tittmann on the part of the United States. Articles VI and VII provided for the surveying and marking of the line between Lake of the Woods and the summit of the Rocky Mountains, and from the latter point to the Gulf of Georgia. The work is completed (1913) with the exception of a few miles west of Lake of the Woods. Article VIII provided for the delineation upon accurate charts of the boundary from the 49th parallel to the Pacific Ocean. The field work is (1913) completed, with the exception of the point at which the line leaves the 49th parallel.

II

ONTARIO-MANITOBA BOUNDARY

Résumé of Differences

THE Quebec Act, 1774, defined the western boundary of the Province of Quebec as extending from the confluence of the Mississippi and the Ohio, 'northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay.'

In 1791 Quebec was divided into Upper Canada and Lower Canada. The division line commenced at Pointe au Beaudet on Lake St Francis; thence northward to the Ottawa River; thence up the Ottawa to the head of Lake Timiskaming, 'and from the head of the said Lake by a line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line *to the utmost extent of the country commonly called or known by the name of Canada.*'

In 1870 an imperial order-in-council was passed providing for the surrender to Canada of all the territorial rights

and claims of the Hudson's Bay Company. Prior to the surrender Ontario's claims to a large area north and west of Lake Superior had been preferred by authorities. After the transfer, settlement commenced in the disputed area, and a decision respecting the conflicting claims of jurisdiction became necessary. The matter was referred to arbitration, and in 1878 the award was delivered fixing the northern boundary at the Albany and English rivers, and the western at a due north and south line from the north-west angle of Lake of the Woods.

Before the award could be confirmed the Mackenzie administration was defeated at the polls. The new administration claimed that the award was recommendatory only, and refused to accept it. In 1881 the Dominion passed an act extending the boundaries of Manitoba. The eastern boundary was a contingent line, and was defined as a due north line from the intersection of the western boundary of Ontario and the international boundary between Canada and the United States. The Dominion government contended that the western boundary of Ontario was the prolongation of a due north line from the confluence of the Ohio and Mississippi, and that the height-of-land between the waters of the St Lawrence and Hudson Bay formed the northern boundary. The dispute was referred to the imperial Privy Council, which in 1884 confirmed the award of the arbitration of 1878.

Having briefly sketched the differences, it is necessary to retrace our steps and examine the various acts of state, etc., affecting this dispute.

Hudson's Bay Company's Charter, 1670[1]

On May 2, 1670, Charles II, 'being desirous to promote all endeavours tending to the public good of our people, and to encourage' the undertaking, granted to his 'dear entirely beloved cousin, Prince Rupert' and his associates 'and their successors, the sole trade and commerce of all these seas, straits, bays, rivers, lakes, creeks and sounds, in what-

[1] See 'The "Adventurers" of Hudson's Bay' in section 1.

soever latitude they shall be, that lie within the entrance of the straits, commonly called Hudson's Straits, together with all the lands, and territories upon the countries, coasts, and confines of the seas, bays, lakes, rivers, creeks and sounds aforesaid, that are not already actually possessed by or granted to any of our subjects, or possessed by the subjects of any other Christian Prince or State . . . and that the said land be from henceforth reckoned and reputed as one of our plantations or colonies in America, called "Rupert's Land." '

This charter to the 'Governor and Company of Adventurers of England trading into Hudson's Bay' or, to use the common form, the 'Hudson's Bay Company,' in so far as it was implemented by effective occupation, formed the basis of the company's territorial claims to the territory draining into Hudson Bay. To determine the limits of the area to which they had perfected their title, it is necessary to review the vicissitudes of the company from the date of the charter to the Treaty of Paris, when the whole of New France passed to the British crown.

Discoveries and Settlements in the Bay

Hudson in 1610-11, Button in 1612-13, Bylot and Baffin in 1616, Foxe in 1631, and James in 1631-32, made voyages of discovery to Hudson Bay, giving England a title by virtue of discovery. In 1668 Gillam erected Fort Charles (Rupert) for Prince Rupert and his associates. Fort Nelson was founded by the Hudson's Bay Company in 1682, and at the same time Radisson, representing the French Compagnie du Nord, established Fort Bourbon in the vicinity. In the spring following Radisson seized Fort Nelson, but in 1684, having re-entered the service of the Hudson's Bay Company, he retook it for the English. The relative status of the claims of England and France as a result of these occurrences is not very clear, but, from the summer of 1668 till the surrender to d'Iberville in 1697, the English could at least claim that they had effectively occupied the territory in dispute.

The French company resolved to expel the English subjects who had intruded in what it considered its pre-

serves. Though it was a time of profound peace, a French force, under the Chevalier de Troyes, set out from Canada in the spring of 1686, and captured Fort Hayes (Moose), Rupert and Albany, the Hudson's Bay Company's posts on the southern portion of Hudson Bay.

Treaty of Neutrality, 1686

The state of affairs was intolerable, and James II and Louis XIV sought to make America neutral. On November 16, 1686, the Treaty of Neutrality was signed at London. It provided for a 'firm Peace . . . as well by Land as by sea, between the British and French Nations in America, as well Northern as Southern,' etc.

Articles IV and V provided that:

> IV. Both Kings shall have and retain to themselves all the Dominions, Rights and Preeminences, in the *American* Seas, Roads, and other Waters whatsoever, in as full and ample manner as of right belongs to them, and in such manner as they now possess the same.
>
> V. And therefore the Subjects, Inhabitants, Merchants, Commanders of Ships, Masters and Mariners, of the Kingdoms, Provinces and Dominions of each King respectively, shall abstain and forbear to trade and fish in all the Places possessed, or which shall be possessed by one or the other Party in *America*, viz., the King of *Great Britain's* Subjects shall not drive their Commerce and Trade, nor fish in the Havens, Bays, Creeks, Roads, Shoals or Places, which the most Christian King holds, or shall hereafter hold in *America*: And in like manner, the most Christian King's Subjects shall not drive their Commerce and Trade, nor fish in the Havens, Bays, Creeks, Roads, Shoals or Places, which the King of *Great Britain* possesses, or shall hereafter possess in *America*.

Article XVIII provided that 'if any Breach should happen . . . between the said Crowns in *Europe*, . . . no act of Hostility either by Sea or Land' should be committed in America by the subjects of either.

When the treaty was signed, while the English held Fort Nelson a French force occupied Fort Albany, and, under the provisions of Article V, the French were virtually con-

firmed in their possession of the southern portion of the bay. In addition, they were conceded the right to fish and trade, in common with the British subjects, in Hudson Bay, except in the vicinity of the single post held by the Hudson's Bay Company, viz. Fort Nelson.

Commissioners were appointed to execute the treaty. The Hudson's Bay Company petitioned them for compensation and for the surrender by the French of their posts, ships, etc. The British commissioners filed a statement setting forth the claim of Great Britain, by virtue of discovery and occupation, 'to Hudson's Bay and Territories thereunto belonging.' The French commissioners in reply claimed: that Champlain had taken possession of the territory; that French subjects had erected forts and traded with the Indians prior to the advent of British traders; that the latter were obliged to enlist the services of Radisson and Groseilliers, two deserters from the French company; and that, inasmuch as the French had a prior title, the treaty was inoperative against France. Commissions, letters patent, acts of possession, etc., were cited, but only by an extraordinary effort of the imagination could they be considered as applying to the Hudson's Bay territory. Respecting the statement that Jean Bourdon had, in 1656, entered Hudson Bay and taken possession, it has been demonstrated that he only reached a point on the Labrador coast in latitude 55° N. Similarly, with reference to the statement that Sieur Couture, a missionary, had in 1663 reached the bay and taken possession, the Jesuit *Relations* prove that the first Frenchman to reach the bay from Canada was Father Albanel, in 1672. The statement of Radisson that he reached the sea from Lake Superior is not, in the opinion of the writer, worthy of credence.

In August 1687 the French commissioners offered to surrender the three forts—Albany, Moose and Rupert—that they had taken from the Hudson's Bay Company in exchange for Fort Nelson, held by the latter. This arrangement was suggested as the most convenient for the two companies, as each king had resolved not to cede to the other the ownership of the whole bay. This proposition

was rejected by the Hudson's Bay Company. It replied that 'it cannot but seem strange and dissonant from all reason that the French Commissioners should now come to offer the said Company their own, which they took by violence in exchange for another part of their own, which the French had never had any colour of right to.'

This attitude was endorsed by the British commissioners, who, on November 16, 1687, informed the French commissioners that the king, James II, had maturely considered the matter and that he

> doth, upon the whole matter, conceive the said Company well founded in their demands, and hath therefore ordered us to insist upon his own right and the right of his subjects, to the whole Bay and Streights of Hudson, and the sole trade thereof, as also upon the demand of full satisfaction, for the damages they have received, and restitution of the three Forts surprised by the French.
>
> We are also ordered to declare to the French Commissioners that His Majesty hath given us powers and directions to enter into a Treaty with the said Commissioners, for the adjusting of limits between the Dominions of both Crowns in America, and doing everything else that may conduce to the removing all occasion of differences between the two nations.

On December 11, 1687, the commissioners executed an agreement stipulating that

> until their said most serene Majesties shall send any new and express orders in writing concerning this matter: it shall not be lawful for any Governor or Commander in Chief of the colonies, islands, lands and territories, belonging to either King's dominions being in America, to commit any act of hostility against or to invade the subjects of the other King, nor shall the said Governors or Commanders in Chief upon any pretence whatever suffer that any violence be done to them under corporal punishment and penalty of making satisfaction with their goods for the damages arising by such contravention nor shall any others do the same under the like penalty.

As the Duke of York had been governor of the Hudson's Bay Company from 1682 till his accession as James II, and

as the company had made him a present of shares, his surprisingly independent and determined tone is understandable.

To remove all suspicion to its loyalty and to more firmly establish its claim to reparation for damages, it was deemed advisable, at the beginning of William III's reign, to procure an act of parliament confirming the charter of Charles II for seven years.

Less than eleven months after the execution of the agreement of December 11, 1687, William of Orange landed at Torbay, and James II was a fugitive.

Upon the accession to the throne of William III and Mary the Hudson's Bay Company renewed its claims for compensation and for the surrender of its forts. One of the articles of the declaration of war against France, May 7, 1689, declared that the French king did 'possess himself of our Territories . . . of Hudson's Bay, in a hostile manner, seizing our Forts, burning our Subjects' Houses,' etc.

In 1693 the company recaptured Fort Albany. In 1694 the French took Fort Nelson. In 1696 the English retook it, but lost it in the following year. It was held by the French till surrendered in 1714, in accordance with the terms of the Treaty of Utrecht.

Treaty of Ryswick, 1697

On September 20, 1697, peace was concluded at Ryswick. Articles VII and VIII provided that

> The Most Christian King shall restore to the said King of *Great Britain*, all Countries, Islands, Forts and Colonies wheresoever situated, which the *English* did possess before the Declaration of this present War ; and in like manner the King of *Great Britain* shall restore to the Most Christian King all Countrys, Islands, Forts and Colonies, wheresoever situated, which the *French* did possess before the said Declaration of War. And this Restitution shall be made on both sides, within the space of six months, or sooner if it can be done. And to that end immediately after the Ratification of this Treaty, each of the said Kings shall deliver, or cause to be deliver'd to the other, or to Commissioners authorized

> in his Name for that purpose, all Acts of Concession, Instruments, and necessary Orders, duly made and in proper Form, so that they may have their Effect.
>
> VIII. Commissioners shall be appointed on both sides, to examine and determine the Rights and Pretensions which either of the said Kings hath to the Places situated in *Hudson's Bay*: But the Possession of those Places which were taken by the *French* during the Peace that preceded this present War, and were retaken by the *English* during this War, shall be left to the *French* by virtue of the foregoing Article.

Article VIII also provided for the appointment of commissioners to determine the boundary between English and French territory.

The terms of the treaty, if carried out, would have been disastrous to the Hudson's Bay Company. Not only was it silent respecting any compensation, but, as Albany was one of the places taken by the French during the peace and retaken by the English during the war, the fort should have been surrendered to the French. Under it the company could claim Fort Nelson only.

Commissioners were appointed under the provisions of Article VIII. The Hudson's Bay Company and the Compagnie du Nord filed statements of claim. On April 29, 1700, the French ambassador proposed that France should keep Fort Nelson, and England Fort Albany, the boundary to be half-way between the two forts and the limits of Acadie to extend to the River St George. Or, he would have agreed that Fort Albany should remain with France, and Fort Nelson with England, the boundary to be midway, but in that case he demanded that 'the limits of France, on the side of Acadie, should extend to the River Kenebec.'

On July 10, 1700, the Hudson's Bay Company submitted a statement to the Lords of Trade and Plantations. After stating that they were willing to accept the following limits,

> in case of an exchange of places, and that the Company cannot obtain the whole Streights and Bay, which of right belongs to them, viz.:
>
> 1. That the French be limited not to trade by wood-

runners, or otherwise, nor build any House, Factory or Fort, beyond the bounds of 53 degrees, or Albany River, vulgarly called Chechewan, to the northward, on the west or main coast.

2. That the French be likewise limited not to trade by wood-runners, or otherwise, nor build any House, Factory, or Fort, beyond Rupert's River, to the northward, on the east or main coast.

3. On the contrary, the English shall be obliged not to trade by wood-runners, or otherwise, nor build any House, Factory, or Fort, beyond the aforesaid latitude of 53 degrees, or Albany River, vulgarly called Chechewan, south-east towards Canada, on any land which belongs to the Hudson's Bay Company.

4. As also the English be likewise obliged not to trade by wood-runners, or otherwise, nor build any House, Factory, or Fort, beyond Rupert's River, to the south-east, towards Canada, on any land which belongs to the Hudson's Bay Company.

As this communication, modified by the later one of January 29, 1701, formed the basis of the settlement of the northern boundaries of Ontario and Quebec, it has been quoted in full.

The Lords of Trade replied requesting the company to state whether (if the French refused to accept these limits) it would consent to an extension to latitude 52½° N. The company, on January 29, 1701, agreed to accept the Canuse (Eastmain) River—latitude 52° 14′ N—as the boundary on the east coast.

Treaty of Utrecht, 1713

On May 4, 1702, war was declared against France, and was only ended by the Treaty of Utrecht, March 3, 1713. Article X of the treaty provided that :

X. The said most Christian King shall restore to the kingdom and Queen of Great Britain, to be possessed in full right for ever, the bay and streights of Hudson, together with all lands, seas, seacoasts, rivers, and places situate in the said bay and streights, and which belong

> thereunto,[1] no tracts of land or of sea being excepted which are at present possessed by the subjects of France. All which, as well as any buildings there made, in the condition they now are, and likewise all fortresses there erected, either before or since the French seized the same, shall, within six months from the ratification of the present treaty, or sooner, if possible, be well and truly delivered to the British subjects, having commission from the Queen of Great Britain to demand and receive the same. . . . But it is agreed on both sides, to determine within a year, by commissaries to be forthwith named by each party, the limits which are to be fixed between the said Bay of Hudson and the places appertaining to the French ; which limits both the British and French subjects shall be wholly forbid to pass over, or thereby to go to each other by sea or by land. The same commissaries shall also have orders to describe and settle, in like manner, the boundaries between the other British and French colonies in those parts.

Article XI stipulated for compensation to the Hudson's Bay Company for its losses.

During the discussion of the terms of peace, difficulties arose respecting the use of the terms 'cession' and 'restitution,' but the British plenipotentiaries insisted on the use of the latter. The French negotiators contended that the clause proposed by the British 'that France shall *restore not only what has been taken from the English*, but also *all that England has ever possessed in that quarter*' would be a source of perpetual difficulties. They therefore presented a map upon which they had indicated the boundary proposed by them. Upon this map the British negotiators had also indicated their claim. Prior, in a dispatch to Lord Bolingbroke, January 8, 1713, says there was no very great difference.[2]

During the proceedings before the commissioners appointed

[1] 'There were two originals of this Treaty, one in Latin and the other in French. This translation is that published by authority of the English Government at the time. The expression here rendered "and which belong thereunto" is in the Latin copy, "spectantibus ad eadem," and, in the French, "et lieux qui en dépendent"' (Ontario-Manitoba Boundary Case, *Joint Appendix*, p. 504 *n.*).

[2] 'As to the limits of Hudson's Bay, and what the ministry here seem to apprehend, at least in virtue of the general expression *tout ce que l'Angleterre a jamais possédé de ce côté là* (which they assert to be wholly new, and which I think

under the Treaty of Utrecht, no mention of this map was made, although Prior's dispatch indicates that in January 1713 it was in the hands of the British.

On February 7, 1712, the Hudson's Bay Company, in a memorandum to the Lords of Trade, claimed as the boundary a line from Grimington Island, on the Atlantic coast in latitude 58½° N, to the south end of Lake Mistassini. The memorandum is silent, however, respecting the line from Lake Mistassini westward, and it is a fair inference that the non-appearance of the map later may have been due to the fact that the British claim *before* the treaty was not as extensive as it was *after* it. Search was made for the map during the preparation of the Ontario-Manitoba Boundary Case, but without success.

On August 6, 1713, Louis XIV ordered the surrender to 'the bearer of the Queen of Great Britain's order, the Bay and Streights of Hudson, together with all buildings and forts there erected, in the condition they now are, with all the cannon and cannon-ball, as also a quantity of powder.' On August 4, 1714, the Hudson's Bay Company made representations to the Lords of Trade respecting limits, urging the boundary to be fixed at a line from 'the said island of Grimington, or Cape Perdrix, to the great lake, Miscosinke, *alias* Mistoveny [Mistassini], dividing the same into two parts, . . . and from the said lake, a line to run southwestward into 49 degrees north latitude . . . and that that latitude be the limit; that the French do not come to the north of it nor the English to the south of it.'

On September 3, 1719, George I signed the commis-

is really so, since our Plenipotentiaries make no mention of it), may give us occasion to encroach at any time upon their dominions in Canada, I have answered, that since, according to the *carte* which came from our Plenipotentiaries, marked with the extent of what was thought our Dominion, and returned by the French with what they judged the extent of theirs, there was no very great difference, and that the parties who determined that difference, must be guided by the same *carte*, I thought the article would admit no dispute. In case it be either determined immediately by the Plenipotentiaries or referred to Commissioners, I take leave to add to your Lordship that these limitations are no otherwise advantageous or prejudicial to Great Britain than as we are better or worse with the native Indians, and that the whole is a matter rather of industry than dominion. If there be any real difference between *restitution* and *cession*, *queritur?*' (Ontario-Manitoba Boundary Case, *Joint Appendix*, p. 501).

sions of Daniel Pulteney and Martin Bladen as British commissaries under the Treaty of Utrecht. Bladen was instructed to endeavour to get the limits claimed by the Hudson's Bay Company, and to take especial care in wording the articles upon limits, that 'the said boundaries be understood to regard the *trade of the Hudson's Bay Company* only; that His Majesty does not thereby recede from the right to any lands in America, not comprized within the said boundaries; and that no pretention be thereby given to the French to claim any tracts of land in America, southward or south-west of the said boundaries.'

He was also instructed to insist that a settlement made by the French since the Treaty of Utrecht, 'at the head of Albany River,' [1] should be demolished.

On November 8, 1719, the British commissaries filed with their French colleagues a memoir on the subject of boundaries. It was practically in accordance with the limits defined in their instructions except that the initial point was the North Cape of Davis Bay in *latitude 56½°* instead of Grimington Island in *latitude 58½°*, and that they demanded that the French 'shall not build forts, or found settlements upon any of the rivers which empty into Hudson's Bay, under any pretext whatsoever, and that the stream, and the entire navigation of all the said rivers, shall be left free to the Company of English merchants trading into Hudson's Bay, and to such Indians as shall wish to traffic with them.' [2]

Colonel Bladen is quoted by Chief-Justice Draper as writing from Paris, in 1719, that there was a 'difference of two degrees between the last French maps and that which the [Hudson's Bay] company delivered us,' which indicates that, south of James Bay, the French claimed to approximate latitude 51°.

[1] This demand was inserted at the instance of the Hudson's Bay Company. No such post had been constructed, and the reference was probably to the Kaministigoya post (on the site of the present city of Fort William, Ontario), established by Sieur de la Nouë in 1717.

[2] These changes were probably what Bladen had in mind when he wrote Delafaye that 'we design to give in the claim of the Hudson's Bay Company, in writing, *with some few additions pretty material for their service* (*Arbitration Documents*, pp. 416-17). (Italics not in original.)

The commissaries on both sides accuse each other of endeavouring to avoid a meeting for the settlement of the boundary question. The British demands had increased since the Treaty of Utrecht, and were unreasonable. It was certain that the French would not accede to them, and, in all probability, Pulteney judged the situation correctly when he wrote :

> I must own that I never could expect much success from this Commission, since the French interests and ours are so directly opposite, and our respective pretentions interfere so much with each other . . . That the French have not been willing to entertain us now and then with a Conference . . . cannot, I should think, be accounted for, but by supposing they knew we came prepared to reject all their demands, and to make very considerable ones for ourselves.

Two memoirs by M. d'Auteuil, procureur-general of Canada, indicate the French claim. They were probably intended to form the basis of a reply to the British demands, but were never delivered. D'Auteuil contended that, as the Treaty of Utrecht only restored Hudson Strait and Bay, the line of separation should commence at Cape Bouton (Chidley) at the entrance to Hudson Strait; thence to pass half-way between the French fort Nemiskau and the English fort Rupert ; thence to a point half-way between Abitibi fort and Moose fort ; thence, ' continuing, at a similar distance from the shores of the Bay, at the western side, until beyond the rivers of Ste Thérèse (Hayes) and Bourbon (Nelson).'

Comte de la Galissonière, in a memoir on the French colonies in North America, December 1750, says : ' The Treaty of Utrecht had provided for the appointment of Commissioners to regulate the boundaries of Hudson's Bay ; but nothing has been done in that matter.' He also claimed that, as the English ' never had but a few establishments on the sea coast, it is evident that the interior of the country is considered as belonging to France.'

In the private instructions to Marquis de Vaudreuil, April 1, 1755, it is stated that ' Although there had been

question on different occasions . . . of naming other Commissioners in execution of the Treaty [of Utrecht] the English had always eluded it.' The Duc de Choiseul in 1761, referring to the boundaries of the Hudson's Bay territories, said: 'Nothing was done.' This is conclusive evidence that no agreement was arrived at, and the question was still in dispute when Canada was ceded to Great Britain.

From 1744 till the Treaty of Aix-la-Chapelle, October 18, 1748, the two countries were at war. Article v of the Treaty of Aix-la-Chapelle provided that 'All the conquests, that have been made since the commencement of the war . . . either in Europe, or the East or West Indies, or in any other part of the world whatsoever, being to be restored without exception.'

Treaty of Paris, 1763

After a year of open hostility war was declared in 1756; Canada was surrendered by Vaudreuil, 1760, and formally ceded to Great Britain, by the Treaty of Paris, February 10, 1763. By Article iv Louis xv ceded

> Canada, with all its dependencies, as well as the Island of Cape Breton, and all the other islands and coasts in the Gulph and River St Laurence, and, in general, everything that depends on the said countries, lands, islands, and coasts, with the sovereignty, property, possession, and all rights, acquired by treaty or otherwise, which the most Christian King and the crown of France, have had till now over the said countries, islands, lands, places, coasts, and their inhabitants.

Article vii defined the western boundary as 'a line drawn along the middle of the river Mississippi, from its source to the river Iberville, and from thence, by a line drawn along the middle of this river and the lakes Maurepas and Pontchartrain, to the sea.'

Great Britain thus became possessed of practically the eastern half of North America, and it was therefore incumbent upon her to provide for the government of this immense area.

The Proclamation of 1763

On October 7, 1763, George III issued a royal proclamation erecting four governments—Quebec, East Florida, West Florida and Grenada. The boundaries of the government of Quebec were defined as follows :

> Bounded on the Labrador coast by the River St John,[1] and from thence by a line drawn from the head of that river, through the Lake St John, to the south end of the Lake Nipissim ; from whence the said line, crossing the River St Lawrence, and the Lake Champlain in forty-five degrees of north latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St Lawrence from those which fall into the Sea ; and also along the north coast of the *Baye des Chaleurs*, and the coast of the Gulph of St Lawrence to Cape Rosiers, and from thence crossing the mouth of the River St Lawrence by the west end of the Island of Anticosti, terminates at the aforesaid River of St John.

To avoid friction between the colonists and Indians, the governors of Quebec, East Florida and West Florida were forbidden to make grants of lands or surveys beyond the bounds of their respective governments. The proclamation also placed under the king's 'Sovereignty, Protection and Dominion' for the use of the Indians all territories not included in Quebec, East Florida, or West Florida, 'or within the limits of the territory granted to the Hudson's Bay Company, as also all the lands and territories lying to the westward of the sources of the rivers which fall into the Sea from the west and northwest as aforesaid.'

The Quebec Act, 1774

In 1774 an imperial act (14 Geo. III, cap. 83), commonly known as the Quebec Act, was passed. The preamble recited that whereas, by the proclamation of 1763, 'a very large extent of country, within which there were several colonies and settlements of the subjects of France . . . was left,

[1] It falls into the St Lawrence opposite the western extremity of Anticosti Island.

without any provision being made for the administration of Civil Government therein,' etc., it was enacted that 'all the Territories, Islands, and Countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line from the Bay of Chaleurs . . . and along the bank of the said [Ohio] river, westward, to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England, trading to Hudson's Bay.' It also provided for the annexation to Quebec of the so-called Labrador coast-strip.

In the same year, 1774, a commission was issued to Sir Guy Carleton as governor of Quebec. In it his government is described as extending from the confluence of the Ohio and Mississippi, 'northward along the eastern bank of the said river [Mississippi] to the southern boundary' of the Hudson's Bay Company's territories. The order-in-council, approving the draft of Carleton's commission, states that it reappoints him with 'such powers and authorities as correspond' with the Quebec Act.

The Constitutional Act, 1791

In 1791 the Constitutional Act authorized the division of the Province of Quebec. On August 24 in the same year an imperial order-in-council established the Provinces of Upper Canada and Lower Canada. The division line was defined as a line from Lake St Francis to the Ottawa River; thence up the Ottawa to the head of Lake Timiskaming; thence by a line drawn due north until it strikes the 'boundary line of Hudson's Bay, *including* all the territory to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada.'

The same phraseology is followed in the commission of Lord Dorchester, 1791, and of others; but, in the commission of Baron Sydenham, 1840, the line is drawn due north until it reaches the 'shore' of Hudson Bay. The change of wording is evidently due to a misconception, a half-century later, by a draughtsman who proposed to 'improve'

the phraseology. The order-in-council of 1791 was intended—like the Quebec Act—to carry the division line to the southern boundary of the Hudson's Bay territories. The Privy Council in 1884 was in doubt, but finally adopted the contention of counsel for Ontario that 'boundary line' signified 'shore'—unquestionably an error. Apparently no one pointed out to it that, in the eighteenth century and later, the term 'Hudson's Bay' was a convenient territorial designation of the area assumed to be granted to the Hudson's Bay Company, and that it was actually so designated on the Mitchell map before the council.

If further proof were needed, it is supplied by the description of the proposed partition line, prepared at the request of Lord Dorchester. The line is therein described to the head of Lake Timiskaming:

> thence running due north to the Boundary of the Territory granted to the Merchants Adventurers of England trading to Hudson's Bay. The Province of Upper Canada to comprehend all the Territories, Land, and Countries which are now subject to, or possessed by His Majesty, to the westward and southward of the said partition line; and the Province of Lower Canada to comprehend all the Territories, Lands, and Countries which are now subject to or possessed by His Majesty, to the eastward of said partition line, and to the southward of the Southern Boundary of the said Territories granted to the Merchants Adventurers of England trading to Hudson's Bay, being no part of the Government of Newfoundland or any other of His Majesty's Provinces in North America at the time of passing of this Act.

This description of the boundaries had been prepared at the express request of the Right Hon. W. W. Grenville, and would, almost certainly, have been adopted for the commission, but for an extrinsic reason, viz., that the infraction on the part of the United States of the treaty of 1783 had induced Great Britain to retain certain posts in the United States pending a satisfactory settlement. It was important, therefore, that the wording should neither exclude these posts, and thus cast doubt upon the right to retain them, nor explicitly claim them, and thus give offence to the United

States. Dorchester's commission, as adopted, was intended to describe in a short form the same boundaries as set forth in Lord Dorchester's draft.

Judicature Acts, 1803 and 1818

In 1803 an imperial act was passed providing that all offences committed in any portion of British North America, not included within Upper or Lower Canada, should be tried as if they had been committed within these provinces. In 1818 the legislature of Upper Canada passed an act authorizing the trial, in any district, of offences committed within the province but without the limits of any described township or county.

The proclamation of Governor Simcoe, of 1792, dividing Upper Canada into electoral districts, defines Kent as including all the territory not included in any other county, and as including 'to the utmost extent of the country commonly called or known by the name of Canada.' This, as an exercise of jurisdiction, strengthened the case for Ontario.

In 1840 the provinces of Upper Canada and Lower Canada were united to 'form and be one Province under the name of the Province of Canada.'

Section 6 of the British North America Act, 1867, provided that the former provinces of Upper Canada and Lower Canada should be severed and constitute the provinces of Ontario and Quebec respectively. Section 146 of the same act authorized the queen to admit other colonies, Rupert's Land and the North-western Territory, into the union.

Rupert's Land Act, 1870

In 1868 the Rupert's Land Act was passed. It defined Rupert's Land as including the whole of the lands and territories *held, or claimed to be held,* by the Hudson's Bay Company. In 1869 the company executed a deed of surrender to Her Majesty, which included all its land except blocks of land adjoining its posts and one-twentieth of the land in the 'Fertile Belt.' In 1870 an imperial order-in-

council ordered that the North-western Territory and Rupert's Land should become part of the Dominion of Canada on payment of £300,000 to the Hudson's Bay Company.

In 1871 the Dominion and the Province of Ontario agreed to appoint commissioners to determine the western and northern boundaries of the latter. As the instructions to the commissioner for the Dominion defined the meridian of the mouth of the Ohio as the western boundary, and the height-of-land between the St Lawrence and Hudson Bay as the northern boundary, the government of Ontario declined to take any action, claiming 'that the boundary line is very different from the one defined.'

Arbitration of Boundary, 1878

In 1873 the Macdonald administration was defeated at the polls, and, in the following year, the Dominion and the Province of Ontario agreed to arbitrate their difference respecting the boundary. In this instance, the fact that governments of the same political complexion were in power at Toronto and Ottawa apparently facilitated an agreement. Ontario nominated the Hon. W. B. Richards, and the Dominion the Hon. Lemuel Allan Wilmot. Owing to the resignation of Richards and the death of Wilmot, they were succeeded by the Hon. Robert A. Harrison, chief justice of Ontario, and Sir Francis Hincks respectively. The Right Hon. Sir Edward Thornton, British ambassador at Washington, was selected as the third arbitrator.

On August 3, 1878, the arbitrators rendered their award. They prolonged the due north line from Lake Timiskaming to Hudson Bay; thence to the mouth of the Albany River; thence, following the Albany, English and Winnipeg Rivers, to the longitude of the north-west angle of Lake of the Woods; thence due south to the north-west angle.

By an act of the imperial parliament, passed on June 29, 1871, the 'Parliament of Canada may, from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, alter, diminish, or otherwise alter the

limits of such province.' Before an act confirming the arbitrators' decision could be passed by the Dominion, the Mackenzie administration was defeated, and the incoming government refused to ratify it.

Reference to the Imperial Privy Council, 1884

In December 1883 it was agreed to refer the matter to the imperial Privy Council. In July following the case was argued by D'Alton McCarthy for the Province of Manitoba, Christopher Robinson for the Dominion, and the Hon. Oliver Mowat and A. Scoble for Ontario. On July 22 the Privy Council reported: (1) that in default of legislation by the Dominion, the award of the arbitrators was not binding; (2) that, nevertheless, the boundary-lines laid down by the award were 'substantially correct and in accordance with the conclusions which their Lordships have drawn from the evidence laid before them'; (3) that the boundary—which they defined in detail—should be in accordance with the award of the arbitrators; (4) that the imperial parliament should pass an act making the decision binding and effectual.

In accordance with the recommendation of the Privy Council, the imperial parliament passed, in 1889, an act defining the northerly and westerly boundaries of Ontario as set forth in the decision of the Privy Council.

Review of the Differences

In reviewing the case it can best be considered under heads: (1) There was the boundary 'northward' from the confluence of the Ohio and Mississippi. The commission to Sir Guy Carleton, drafted only a few months after the Quebec Act, and the terms of the order-in-council indicate conclusively that the western boundary of the Province of Quebec followed the bank of the Mississippi from the mouth of the Ohio northward to the Hudson's Bay Company's territories. The contention that 'northward' necessarily meant 'due north' was, from a geographical point of view, absolutely untenable. In addition, the Quebec

Act was expressly enacted to provide civil government for 'a very large extent of country, within which there were several colonies and settlements of the subjects of *France*,' which country was not included in the government of Quebec as established by the royal proclamation of 1763. As there were French settlements in the territory between the Mississippi and the due north line from the mouth of the Ohio, the adoption of the latter would have nullified the express purpose of the act so far as this portion of the country occupied by 'settlements of the [former] subjects of *France*' was concerned. It is not an unreasonable theory that the verbal change in Carleton's commission was due to the discovery that in this respect the wording of the Quebec Act lacked clearness.

The case for the Dominion would have been much stronger had counsel admitted that the western boundary, as defined in the Quebec Act, followed the Mississippi to its source in the height-of-land, and contended that from this point the boundary followed the height-of-land eastward—basing his contention on the fact that the water-parting formed the southern boundary of the territory granted to the Hudson's Bay Company by its charter. Thus, during the second day's proceedings before the Privy Council, counsel for Manitoba was forced to concede that Ontario had exercised jurisdiction in a considerable area west of the due north line. That the 'height-of-land' contention placed the eastern boundary of Manitoba about sixty miles *west* of Port Arthur, and that the 'due north' line passed *east* of Port Arthur and Fort William—the most important Canadian ports on Lake Superior—probably had a determining influence in leading Manitoba to contend for the wider boundary.

(2) The western boundary of Quebec (1774) was defined as running northward to the southern boundary of the Hudson's Bay Company's territories. The Dominion and Manitoba contended: that the company had a good title to all the territory covered by its charter, viz. the area draining into Hudson Bay and Hudson Strait; that this territory was transferred to the Dominion by the Rupert's Land Act; and that, with the exception of the portion included

within the bounds of Manitoba, the title to this vast area was vested in the Dominion.

Ontario contended that the Hudson's Bay Company had perfected a title to a limited area only, and that, when in 1700 and 1701 it offered to accept the Albany River as its southern limit in that quarter, it defined the bounds of the territory in which they had perfected their title. In addition, as already stated, under the terms of the Treaty of Ryswick, even Fort Albany should have been surrendered to the French, as it was one of the places taken by the French during the peace and retaken by the English during the war. All later territorial cessions, whether under the Treaty of Utrecht or Treaty of Paris, enured to the British crown. Even in 1763, when Canada with all its dependencies was ceded to Great Britain, the Hudson's Bay Company had only one inland post, viz. Henley House, on the Albany River, founded in 1741.

Counsel for Manitoba contended that, even if the limits of the British territory in the Hudson Bay basin were curtailed, yet, under the rule of *postlimini*—'in virtue of which, persons and things taken by the enemy are restored to their former state on coming again into the power of the nation to which they belonged' (Vattel)—territory of which the Hudson's Bay Company was temporarily deprived reverted to it after the peace of 1713 and of 1763. Counsel for Ontario contended successfully that the argument was fallacious, the validity of the grant to the company being denied *in toto* as respected territories in the possession of France, which territories, moreover, were excluded by its qualifying clause, 'not already actually possessed by . . . subjects of any other Christian Prince or State'; and that even granting the validity of the territorial grant, its subsequent curtailment by the operations and acquisitions of the French, conserved to them by the treaties of Neutrality, 1687, and of Ryswick, 1697, put an end to any right of *postliminium*. Ontario claimed that the 'company had, as a result of the wars and treaties between the two powers, become divested of the territorial title which the charter purported to confer, except in so far as the Crown might thereafter see fit to recog-

nize it, in whole or in part, *cum gratia*, and that the Crown having also become possessed of the rival title of France, it united in itself every interest.' [1]

On the other hand, the French had founded Fort Mistassini before 1703; Abitibi, on Lake Abitibi, in 1686; Fort Piscoutagany, on a branch of the Abitibi River, about 1673; Fort St Pierre, 1731, and Maurepas, 1734, on the Rainy River and Winnipeg River respectively. On the Saskatchewan River, Fort Bourbon was founded about 1749; Paskoyac, about 1755; Fort à la Corne, 1753; a fort was constructed at the site of the present city of Winnipeg about 1734; and the French had ascended the waters of the Saskatchewan to a point 'three hundred leagues' above Fort Paskoyac (modern, The Pas).

It is obvious from the foregoing that the French had effectively occupied the upper portions of the country claimed by the Hudson's Bay Company.

(3) The next point to be considered is: where was the western boundary of Ontario?

From the Quebec Act, 1774, till the preliminary treaty of peace, 1782, it was a line 'northward' from the mouth of the Ohio to the southern boundary of the Hudson's Bay Company's territories, which were assumed to be intersected at, or near, the source of the Mississippi. From 1782 till the Constitutional Act, 1791, it was assumed to follow the Mississippi northward, from its intersection by a *due west* line from the north-west angle of Lake of the Woods, though, as a matter of fact, the source of the Mississippi is 150 miles almost exactly *due south* of the north-west angle.

The Constitutional Act provided for the division of Quebec into Upper Canada and Lower Canada. The order-in-council dividing Quebec defined the former as including all the territory to the westward and southward of the division line 'to the utmost extent of the country commonly called or known by the name of Canada.' Lord Dorchester's commission, issued only three weeks later, defined Upper Canada as including all such territories west of the division line 'as were part of our said Province of

[1] *Proceedings before the Imperial Privy Council*, p. 235.

Quebec.' When the attention of Henry Dundas, secretary of state, was drawn to the variation in these documents, he replied that the difference 'does not, I conceive, amount at all to a variance between them, and is therefore perfectly immaterial.' This demonstrates that 'Canada' and the 'Province of Quebec' were treated as interchangeable terms.

Much evidence was introduced by Ontario to prove that the territory forming the present province of Manitoba and southern portions of Saskatchewan and Alberta was occupied by the French. That they established posts and explored the country, possibly to within sight of the Rockies, is undeniable, but there is no evidence to warrant the inference that they had a considerable number of soldiers in the territory,[1] or that their forts were anything more than stockaded trading posts. They had, undoubtedly, 'occupied' the country prior to the cession of Canada. Following the cession, British fur traders from Montreal entered the country and intercepted the Indians on their way to Hudson Bay. At the date of the cession the Hudson's Bay Company had only one inland post, viz. Henley House, on the Albany River, about 150 miles from its mouth. Until 1774, eleven years later—when they constructed their first inland fort, Cumberland House—they had not a single post in the prairie country.

Counsel for Ontario was undoubtedly justified in contending that the region drained by the Saskatchewan and Red Rivers—known officially as 'Poste de la Mer de l'Ouest' —was included within the limits of the 'country commonly called or known by the name of Canada.' Whether this view would have been accepted by the Privy Council but for the able manner in which *ex parte* arguments and deductions were put forward by counsel for Ontario, is not so certain. In any event, Oliver Mowat, while arguing for the larger claim—to strengthen his case for the smaller—acknowledged that, as Ontario had not protested the erection of Manitoba, he was estopped from claiming any portion of the

[1] Bougainville was quoted as reporting, respecting the post at Lake Abitibi, that it 'may contain one hundred men.' Even without the proof afforded by the context, it is certain that this statement referred to the number of *Indians* trading at the post—not to *soldiers* or *engagés*.

area included within that province, and declared that he would be satisfied if Ontario were awarded the limits defined by the arbitrators.

(4) Where was the southern boundary of the Hudson's Bay Company's territories? The references to the Treaty of Ryswick and subsequent negotiations demonstrate that the Hudson's Bay Company, in 1700 and 1701, offered to accept the Albany River as the boundary between its territory and that of the French and, in addition, under the terms of the treaty, it should have surrendered Albany and all the other posts on the bay except Nelson. This therefore determined its territorial rights. The cessions by the Treaty of Utrecht and the Treaty of Paris enured to the British crown, and not to the Hudson's Bay Company. The company's servants were thenceforth, in the territory south and west of Hudson Bay, as British subjects, with the same rights and privileges as other traders.

While the negotiations subsequent to the Treaty of Ryswick fixed the limit of the Hudson's Bay Company's claims at the Albany River, there was no defined boundary above Lake St Joseph—the point at which the Albany loses its identity. The arbitrators followed the English and Winnipeg Rivers, doubtless because they occupy the western prolongation of the Albany Valley. Inasmuch as the description in Carleton's commission was intelligible to the north-west angle of Lake of the Woods—and no farther—and inasmuch as the north-west angle is almost exactly due north of the source of the Mississippi, they prolonged the international boundary from this point, northward, to its intersection with the Winnipeg River.

Map Evidence before the Privy Council

An account of the proceedings before the Privy Council would be incomplete without a reference to the map evidence produced and the errors contained therein. The evidence submitted on behalf of the Dominion and Manitoba respecting maps and the information disclosed by them was distinctly defective.

A map was prepared specially for the hearing, and was put in by counsel for Ontario. It was only on the afternoon of the last day but one that the accuracy of the information it contained was challenged by counsel for Manitoba, who stated that he and his colleagues had not seen it 'even, until the first day of the hearing,' but no reason was given for not challenging it immediately on introduction, as *ex parte* evidence. The map was in the hands of the Law Lords and was referred to by them repeatedly, and even by counsel opposing Ontario. The former were much impressed by the French forts indicated on it, notably one on the portage between the waters of Albany and English Rivers marked 'French Post, 1673 (approx. site),' by Fort La Maune and by Fort Piscoutagany or St Germain. As regards the first mentioned, no evidence of importance has ever been adduced to indicate that the French ever had a post in, or near, this point.

Fort La Maune was constructed by Dulhut 'near the River La Maune, at the bottom of Lake Alemepigon.' 'Bottom of Lake Nipigon' means, unquestionably, the portion of Lake Nipigon opposite the outlet, and, on Jaillot's map, 1695, it is shown at the mouth of the present Ombabika River, with a note—'Poste du Sr Duluth pour empêcher les Assiniboels et autres sauvages de descendre à la Baye de Hudson.' There is no reason to suppose that it was anywhere but on Lake Nipigon.

Respecting the impression created by La Maune, as shown on the Ontario map, the Lord Chancellor said: 'It is extremely important in connection with this present controversy, if it is the fact that there was at that time a fort on the eastern angle of Lake St Joseph constructed by the French.' Later, counsel for Manitoba actually admitted that this fort had been constructed on the 'Albany River.'

Fort Piscoutagany or St Germain is also shown on Jaillot's map at the outlet of Lac Piscoutagany, and is marked 'Poste du Sr de St Germain pour couper presque toutes les voies des Sauvages du Nord et les empêcher de descendre à la Baye de Hudson.' Piscoutagany, or Peischagami (Nighthawk), is unquestionably the modern

Nighthawk Lake, situated about *forty miles south-west of Lake Abitibi*, and on the Frederick House branch of the Abitibi.

On the Ontario map both La Maune and St Germain are shown on the Albany. No evidence has been adduced to justify placing the former there, though some maps of *later date* than Jaillot's indicate St Germain on the Perrai River, which on some maps corresponds to the Ombabika, a tributary of Lake Nipigon; and on others to the Missinaibi branch of Moose River—not the Albany—though the topography is so grossly inaccurate that it is probably based on Indian report only. The apparent inconsistency was probably due to an attempt to offset the demands of the English, subsequent to the Treaty of Utrecht, for a boundary that included territory claimed by the French on the ground of prior occupation and discovery.

The French refused to concede the boundaries demanded, and made a counter-claim that the boundary should pass half-way between their posts and those established by the Hudson's Bay Company. From about this date the French geographers 'decapitated' the rivers flowing into James Bay from the south, and extended the streams draining into the St Lawrence. Hence the difficulty experienced in correlating the topography of the region affected, as shown on these maps, and as shown on modern maps.[1]

A copy of Mitchell's map of North America, 1755, which had been procured from the Hudson's Bay Company by the Dominion, was submitted to the arbitrators as the map 'before the commissioners when the Treaty of 1783 was made.'[2] As already stated, there is no evidence extant to identify any map as the one used by the negotiators of 1782. On the Mitchell map the height-of-land between the waters of Hudson Bay and of the St Lawrence is designated 'Bounds

[1] On d'Anville's map, 1746, 'R. d'Abitibi,' 'L. d'Abitibi,' 'Lac Pisgotagami' and 'St Germain' post are transferred bodily to form the upper portion of the Albany River, probably to form the foundation of a claim to this portion of the area drained by it. As there is an Abitibi lake and an Abitibi river correctly shown, this map contains two lakes and two rivers bearing the same names.

[2] So stated by counsel for Ontario, but in error; he probably referred to the British Records Office map, which has no historical connection with the negotiations of 1782 (not '1783'). See p. 822.

of Hudson Bay by the Treaty of Utrecht.' As Lake of the Woods is indicated as discharging into Lake Superior, the height-of-land line passes to the north of it. It is obvious that, if the geographical information contained in the map had been correct, the line would have been drawn to pass *between* Lake of the Woods and Lake Superior, and that, so far as it evidenced anything, it demonstrated that the boundary followed the height-of-land irrespective of its actual position as determined by actual surveys. The Privy Council accepted this evidence, which really militated *against* the contention of Ontario, *as evidence in favour of it*, and counsel for the Dominion and Manitoba did not point out that this line, being drawn north of the Lake of the Woods, really demonstrated that the actual line passed east of it.

In addition, there was actually in the British Museum the famous King George III map—which has been referred to at length in connection with the Ashburton Treaty. On it are drawn heavy coloured lines, commencing at Grimington Island on the Labrador coast; thence south-westward through Lake Mistassini to the 49th parallel; and thence following the parallel to the limits of the map, and designated, '*Boundary between the lands granted to the Hudson's Bay Company and the Province of Quebec.*' This map would have been absolutely conclusive proof that the British government in 1774 considered that the 49th parallel formed the north-western boundary of Quebec. If this map had been produced, it is at least doubtful whether the award would have been confirmed.

Another point overlooked by counsel opposing Ontario was, that the grant to Lord Selkirk by the Hudson's Bay Company actually included, north of the international boundary, Hunters Island and a strip of adjoining territory extending to the height-of-land.

Review of the Case before the Privy Council

A critical study of the proceedings emphasizes the masterly manner in which Sir Oliver Mowat conducted the case for Ontario. He and his colleagues had been studying the case

for years, and he has been quoted as stating that they were saturated with it.[1] Mowat's skill in presenting his case is demonstrated by the fact that, at the outset, the Law Lords considered his position untenable.[2]

Though it has been necessary to indicate points that might have been made by counsel opposing the claims of Ontario, it is obvious that, with only seven months' preparation—as compared with about twelve years by counsel for Ontario—they were labouring under great disadvantages. It is a fair inference that the astute premier of Ontario, when proposing that the case should be heard at an early date, fully appreciated the handicap thus imposed upon his opponents.

In addition, it is much easier for the student, with ample time for investigation, to criticize than for counsel to meet the various points as made by his opponents. This, however, does not apply to the map evidence. The map filed by Ontario should have been repudiated as soon as presented, and, had the Dominion and Manitoba had the assistance of an expert geographer—one who could read the evidence disclosed by the maps in the light of the printed documents and *vice versa*, thus supplementing and verifying other evidence—the errors respecting the French forts, etc., would have been exposed. From and including the preliminary treaty of peace, 1782, down to modern times, Canada has suffered territorial losses due to the use of inaccurate maps. Only on one occasion has an adequate attempt been made to present map evidence, namely, in connection with the Alaska boundary, and then practically all the map evidence was in favour of the United States.

It has been stated that, after the cession of Canada, 1763,

[1] C. R. W. Biggar, Sir Oliver Mowat's biographer, says that 'his colleague, Mr Scoble, now Sir Andrew Scoble, and himself a member of the Judicial Committee of the Privy Council, told me not long afterwards that both he and the members of the Judicial Committee were profoundly impressed, first, by Mr Mowat's extensive and accurate information, and secondly, by the ability with which he handled the case from beginning to end, and answered without losing the thread of his argument, the innumerable questions propounded by the Law Lords' (*Sir Oliver Mowat*, i. p. 420).

[2] Although, on the first day of the hearing, the Lord Chancellor stigmatized Mowat's contention respecting the limitation of Rupert's Land as 'most extraordinary' (*Proceedings before the Imperial Privy Council*, etc., p. 58), he and his colleagues later accepted it *in toto*.

the Hudson's Bay Company's employees were in the inland territory south and west of Hudson Bay as British subjects with the same rights and privileges as other traders. From the time the company entered the Saskatchewan country in 1774, till it absorbed the North-West Company in 1821, it was in active competition with the Montreal traders, and all attempts to enforce its exclusive claims were successfully resisted. From the union in 1821 till the surrender in 1869 it was all-powerful in, and had a monopoly of, the trade of a vast region, including the whole of the present Canada, except the southern portions of Ontario and Quebec and the Maritime Provinces. On the other hand, although for a half-century it claimed and maintained territorial rights it was not, in a strictly legal sense, entitled to, there can be no doubt that it was its presence, its aggressiveness, its great influence with the British government and its intimate knowledge of the country that saved to the British crown all the territory west of Lake Superior, and it was entitled to the most liberal treatment when Canada negotiated for the extinguishment of the title to 'the whole of the lands and territories held, or claimed to be held' by the ancient and honourable 'Company of Adventurers of England trading into Hudson's Bay.'

Respecting the decision of the imperial Privy Council, if the map evidence had been adequately presented, it is doubtful whether Ontario would have obtained so sweeping a decision. On the other hand, it would have been exceedingly unfortunate if the province had been confined to the narrow triangular strip shown on the George III map—particularly west of Lake Superior.

The account of the case would be incomplete without a reference to the story that attributes the decision against Manitoba's claims to the anxiety of the Law Lords to get away for the opening of the grouse season. In the first place, no one has ever offered an adequate explanation why this anxiety should be detrimental to Manitoba rather than to Ontario. In the second place, the decision was rendered on July 22, nearly three weeks before the grouse season opened.

III

LABRADOR-CANADA BOUNDARY[1]

The Royal Proclamation of 1763

THE royal proclamation issued in 1763 transferred the north 'coast' of the Gulf of St Lawrence, the Atlantic 'coast' of the mainland, Anticosti, and the Magdalen Islands to Newfoundland. It also erected the government of Quebec, and included within the new province a roughly triangular area, bounded on the east by the St John River. This stream falls into the St Lawrence opposite the western extremity of Anticosti, and was almost certainly chosen because of its geographical position, irrespective of its importance as a topographic feature—or the reverse.

The territories not otherwise provided for, including, of course, the portion of the present Ungava Peninsula not within the bounds of the Hudson's Bay Company's territories, were provided for by the following clause :

> And we do further declare it to be our Royal will and pleasure for the present, as aforesaid, to receive under our Sovereignty, protection, and Dominion, for the use of the said Indians, all the lands and territories not included within the limits of our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company, as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid.

The proclamation, therefore, assigned :

(*a*) To Newfoundland : the *coast-strip* from a point on the north shore of the St Lawrence opposite the west end of Anticosti, to the entrance to Hudson Strait, and also Anticosti and the Magdalen Islands.

(*b*) To Quebec : a triangular area including, in large part, the settled portion of New France.

(*c*) To the crown : all other portions of the mainland north

[1] The history of the Ontario-Manitoba boundary is, down to 1763, also the history of the Labrador boundary, and need not be here repeated.

of the St Lawrence, not included in Newfoundland or Quebec. This, therefore, included the northern portion of the present province of Quebec, and the 'hinterland' of the Labrador coast-strip.

The commission to General Murray, November 21, 1763, appointing him 'Captain General and Governor-in-Chief in and over Our Province of Quebec,' and the commission to Sir Guy Carleton, April 12, 1768, describe the boundaries of Quebec in practically the same language as the proclamation.

The Quebec Act, 1774

A petition for the extension of the limits of Quebec was presented to parliament, and in 1774 the Quebec Act (14 Geo. III, cap. 83) was passed by the imperial parliament.

The preamble recites that

> Whereas His Majesty, by His Royal Proclamation, bearing date this seventh day of October, in the third year of His Reign, thought fit to declare the provisions which had been made in respect to certain countries, territories, and islands in America, ceded to His Majesty by the definitive Treaty of Peace, concluded at Paris on the Tenth Day of February, one thousand seven hundred and sixty-three : and whereas, by the arrangements made by the said Royal Proclamation, a very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said Treaty, was left, without any provision being made for the administration of Civil Government therein ; and certain parts of the Territory of Canada, *where sedentary fisheries had been established and carried on by the subjects of France, inhabitants of the said Province of Canada, under grants and concessions from the Government thereof, were annexed to the Government of Newfoundland, and thereby subjected to regulations inconsistent with the nature of such fisheries.*[1]

Clause I provided for the extension of the boundaries of the province so as to include 'all the territories, islands, and countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line from the Bay of

[1] Italics not in original.

Chaleurs, along the High Lands which divide the rivers that empty themselves into the River St Lawrence from those which fall into the Sea, to a point in forty-five degrees of northern latitude . . . and northward to the southern boundary of the territory granted to the Merchants Adventurers of England, trading to Hudson's Bay.' It thus transferred to Quebec all the territory lying between the described southern boundary of the province and the Hudson's Bay Company's territories.

It also annexed the Labrador 'coast-strip' to Quebec, as follows :

> And also all such territories, islands, and countries, which have, since the Tenth of February, one thousand seven hundred and sixty-three, been made part of the Government of Newfoundland, be, and they are hereby, during His Majesty's Pleasure, annexed to, and made part and parcel of the Province of Quebec as created and established by the said Royal Proclamation of the Seventh of October, one thousand seven hundred and sixty-three.

The declared intent of the Quebec Act was to annex to Quebec 'all the territories, islands and countries in North America, belonging to the Crown of Great Britain, bounded on the south, by a line from the Bay of Chaleurs' to the mouth of the Ohio, and on the north by the 'southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay.' Coupled with this is the clause annexing to Quebec the coast-strip placed under the jurisdiction of Newfoundland by the proclamation of 1763. Obviously, therefore, the Quebec Act included within the bounds of that province all British territory bounded on the south by the defined line between Chaleur Bay and the mouth of the Ohio ; on the west, by the Mississippi ; and, on the north, by the Hudson's Bay territories.

This is further confirmed by the imperial order-in-council of August 24, 1791, establishing the Provinces of Upper Canada and Lower Canada, wherein the dividing line, in part, follows from the head of Lake Timiskaming 'by a line drawn due north until it strikes the boundary line of Hudson's Bay.'

In the chapter respecting the Ontario-Manitoba boundary it was shown that investigation has practically demonstrated that 'Hudson's Bay' in this order-in-council means the Hudson's Bay Company's territories.

Chief Justice Smith, in his letter of February 6, 1790, enclosing a proposed addition to the description of boundaries in Lord Dorchester's commission, says: 'I suppose it is intended, that Upper and Lower Canada shall divide between them, what remains of His Majesty's Dominions in this quarter of North America, and is not part of Newfoundland, nor of other British Provinces.' He also enclosed a proposed addition importing that by Canada is meant 'all the Dominions of New France, as claimed by the French Crown before the conquest.'

Having demonstrated that Lower Canada, by the order-in-council of 1791, included the whole of the mainland east of Upper Canada and lying north of the River and Gulf of St Lawrence, and east and south of the Hudson's Bay Company's territories, the only indeterminate factors are the limits of the latter. The decision of the imperial Privy Council in the Ontario-Manitoba Boundary case fixes the southern boundary on the west side of James Bay at the Albany River, presumably on the ground that the company's offer in 1700 and 1701 to accept it definitely determined their territorial limits in that quarter. It is a fair inference that their offer in 1701 to accept the Eastmain River as their boundary on the east shore had a similar effect. As their offer explicitly states that the French should be forbidden to pass the river, it indicates this stream as the boundary from mouth to source. On the Labrador coast they offered to accept Grimington Island as the boundary. If the English contention be adopted, all the territory to the east and south of a line from Grimington to the source of the Eastmain was part of New France; if the French contention be adopted, New France included the territory to the south-east of a line from Cape Chidley to a point half-way between the French post at Lake Nemiskau and Fort Rupert.

That the line Commissary Bladen was in 1719 instructed to claim is practically identical with the Hudson's Bay

Company's line from Grimington to the Eastmain is a curious coincidence.

Whether the boundary-line be drawn from Chidley toward the Nemiskau-Rupert line, or from Grimington to Mistassini is of little importance, as the intervening territory falls to Quebec either as having been part of New France or as part of the Hudson's Bay Company's territories.

Having shown that the Quebec of the Quebec Act extended to, at least, the Grimington-Mistassini line, it only remains to consider the effect of subsequent legislation by the imperial government.

Imperial Legislation subsequent to 1774

It is to be noted that the proclamation of 1763 provides as follows :

> And to the end that the open and free fishery of our subjects may be extended to and carried on upon the Coast of Labrador and the adjacent Islands, We have thought fit, with the advice of our said Privy Council, to put all that coast, from the River St John's to Hudson's Streights, together with the Islands of Anticosti and Madelaine, and all other smaller Islands lying upon the said coast, under the care and Inspection of our Governor of Newfoundland.

When, by the proclamation of 1763, the north shore of the Gulf of St Lawrence was subjected to the operation of English law and custom, the French-Canadian fishermen complained ; and, similarly, the Newfoundland fishermen also complained when the Gulf and Atlantic coasts were, in 1774, placed under the jurisdiction of Quebec.

The act of 1774 transferred to Quebec 'all such territories' which had, since February 10, 1763, 'been made part of the Government of Newfoundland.' The preamble recites that whereas 'certain parts of the territory of Canada, where sedentary fisheries had been established and carried on by the subjects of France, inhabitants of the said Province of Canada,' etc.

In a memorial relative to the proposed extension of the limits of Quebec, *ante* 1774, it is stated that the eastern

boundary of Quebec had been fixed at the St John River 'from an apprehension' that the French Canadians had no settlements or 'lawful possessions beyond those Limits,' and that a 'valuable Cod Fishery might be carried on upon that Coast.' It was later discovered that there were a 'variety of claims to possessions upon the Coast of Labrador between the River St John and the Straits of Belle Isle, and that by far the greatest part of that Coast is impracticable for a Cod Fishery.'

Judicature Act, 1803.—An imperial act (43 Geo. III, cap. 138), 1803, provided for the extension of the jurisdiction of the courts of justice in Lower Canada and Upper Canada to the trial and punishment of persons guilty of offences 'in the Indian Territories, and other parts of [British North] America, not within the limits of the provinces of Lower or Upper Canada, or either of them, or of the jurisdiction of any of the Courts established in those Provinces.'

Judicature Act, 1821.—Act 1-2 Geo. IV, cap. 66, 1821, extended and confirmed the act of 1803. It specifically extended the jurisdiction to the Hudson's Bay Company's territories also.

Labrador Act, 1809.—An imperial act (49 Geo. III, cap. 27), 1809, provided for the re-annexation to Newfoundland of 'such parts of the coast of Labrador from the River St John to Hudson's Streights, and the said Island of Anticosti, and all other smaller islands so annexed to the Government of Newfoundland by the said Proclamation of the seventh day of October one thousand seven hundred and sixty-three (except the said Islands of Madelaine) shall be separated from the said Government of Lower Canada, and be again re-annexed to the Government of Newfoundland.'

Judicature Act, 1824.—Act 5 Geo. IV, cap. 67, 1824, empowered the Governor of Newfoundland to institute a court of civil jurisdiction at any such parts or places on the coast of Labrador as have been re-annexed to Newfoundland.

Labrador Act, 1825.—Act 6 Geo. IV, cap. 59, 1825, recites that, as it is expedient that certain parts of the coast of Labrador should be re-annexed to Lower Canada: 'Be it therefore enacted that so much of the said Coast as lies

to the Westward of a line to be drawn due North and South from the Bay or Harbour of Ance Sablon, inclusive as far as the 52nd degree of North latitude, with the Island of *Anticosti* and all other Islands adjacent to such part as last aforesaid of the Coast of Labrador, shall be and the same are hereby re-annexed to and made a part of the said Province of Lower Canada.'

An imperial act (3-4 Vict. cap. 35), 1840, reunited the provinces of Upper Canada and Lower Canada.

The British North America Act, 1867, enacts that 'the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.'

The Rupert's Land Act (31-32 Vict. cap. 106), 1868, empowered the surrender of the lands, privileges and rights of the Hudson's Bay Company, and an imperial order-in-council, June 23, 1870, provided for the admission into the Dominion of Canada of Rupert's Land and the North-western Territory.

Imperial Order-in-Council, 1880.—The imperial order-in-council of July 31, 1880, provides that

> whereas it is expedient that all British territories and possessions in North America, and the islands adjacent to such territories and possessions, which are not already included in the Dominion of Canada, should (with the exception of the colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion.

Differences having arisen between the Dominion and the Province of Quebec respecting the northern boundary of the latter, a Dominion Act (61 Vict. cap. 3) was passed in 1898, defining the boundary as the Eastmain River from the mouth to its source; thence due east to the Ashuanipi River; thence downstream through said river and the Hamilton River to the western boundary of Labrador.

Historical

Summing up, it is evident that, for a proper understanding of the rival claims of the English and French, it is necessary to review the history of settlement and occupation in the Ungava Peninsula. No British settlements had been made on the Atlantic or Gulf coasts prior to the cession of Canada,

nor had British fishermen fished on either. On the other hand, the French had carried on the fisheries for many years and had established small settlements, particularly on the north shore of the Gulf. Cartier, in 1534, found the name Brest attached to a harbour about eleven leagues west of Ance Sablon, which proves that Breton sailors had preceded him. Mingan seigniory was granted in 1661, and other grants of fishing rights, etc., were also made by the French. On de l'Isle's map, 1703, Fort Pontchartrain is indicated near the mouth of Eskimo River, and other posts are indicated on later maps. The ordinance of Raudot, September 7, 1709, defines the boundaries of Tadoussac—granted to Demaure in 1658—in part as follows :

> Mistassins, and behind the Mistassins as far as the Hudson's Bay ; and on the lower part of the river the domain will be bounded . . . by Cape Cormorans as far as the height-of-land, in which extent will be comprised the river Moisey, the Lake of the Kichestigaux, the Lake of the Naskapis, and other rivers and lakes which discharge therein.

In 1733 Hocquart granted to Pierre Carlier the exclusive trade, hunting and fishing from Isle aux Coudres to a point two leagues below Seven Islands and 'in the posts of Mistasinnoc, Naskapis,' etc., and the places dependent on them.

In 1702 Vaudreuil conceded to Legardeur de Courtemanche the privilege of trading and fishing on the coast between Kegashka and Hamilton Rivers. Courtemanche constructed, at the present Bradore Bay, a post called Fort Phelypeaux. These privileges were exercised by him and by his son-in-law Brouague till after 1759.

In 1770 the Moravians established their first mission on the Atlantic coast of Labrador. When, in 1777, the first English settlers arrived at Hamilton Inlet, they found traces of abandoned French settlements. The Hudson's Bay Company established Fort Chimo in Northern Ungava in 1827, and the Erlandson Lake post in 1838. Their first post on Hamilton Inlet was established in 1837, and Fort Nascopee on Lake Petitsikapau—an expansion of Hamilton River—in 1840.

Conclusions

From the foregoing it is evident that :

(1) From 1763 to 1774 Quebec included the whole of Ungava Peninsula except the Hudson's Bay Company's territories, and a *strip of coast* from St John River to Cape Chidley.

(2) From 1774 to 1809 Quebec included the whole of the peninsula except the Hudson's Bay Company's territories, and in 1803 and in 1821 the jurisdiction of the courts of Lower Canada was extended to these territories also.

(3) From 1809 to 1825 the coast-strip from St John River to Cape Chidley was again under the jurisdiction of Newfoundland.

(4) Since 1825 the coast-strip between St John River and Ance Sablon has been under Lower Canada (Quebec).

(5) The proclamation of 1763 explicitly states that the 'coast' was placed under the governor of Newfoundland 'to the end that the open and free fishery may be extended and carried on upon the coast of Labrador and the adjacent islands.' The act of 1774 transferred to Quebec, specifically, the territory that had been placed under Newfoundland in 1763, and stated that it formed part 'of the territory of Canada where sedentary fisheries' had been carried on by the French prior to the Conquest. The act of 1809 re-transfers the same coast-strip to Newfoundland, and the act of 1825 re-annexes a portion of it to Lower Canada. There is the same continuity throughout, demonstrating that the strip annexed to Quebec in 1825 had the same *depth* —whatever it may be—as the original strip of 1763.

(6) It is obvious that this strip must have been sufficiently wide for the administration of justice, so far as it affected the fishermen—and no wider.

(7) As the government of Newfoundland did not protest the boundaries of Quebec, as defined in the Dominion act of 1898, they are estopped from claiming the territory included therein.

(8) Newfoundland has laid claim to the portion of Ungava Peninsula that drains into the Atlantic and Strait of

Belleisle through her Labrador coast-strip, though it is difficult to conceive that such an extensive claim rests upon a substantial basis.

An imperial act (3-4 Will. IV, cap. 41) enacted that 'it shall be lawful for His Majesty to refer to the said Judicial Committee for Hearing or Consideration any such other Matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid.'

By virtue of this act the dispute can be referred to the imperial Privy Council for decision. It should be so referred, and the differences then adjusted, at an early date.

IV

ALASKA BOUNDARY

Ukase of 1821

ON September 4, 1821, Alexander I, Emperor of all the Russias, signed a ukase granting 'the pursuits of commerce, whaling, and fishery, and of all other industry' on the north-west coast of America between Bering Strait and latitude 51° N, to Russian subjects exclusively. It also prohibited foreigners, under heavy penalties, from approaching these coasts within less than one hundred Italian (geographical) miles.

On November 12, 1821, this decree was officially communicated to the government of Great Britain by Baron de Nicolai. Sir Charles Bagot, British ambassador at St Petersburg, was informed by Count Nesselrode that 'the object of the measure was to prevent the "commerce interlope" of the citizens of the United States,' who not only carried on an illicit trade in sea-otter skins, but traded prohibited articles, especially gunpowder, with the natives of Russian America. Sir Charles reported to the British government that 'this extraordinary pretension has been adopted from, and is supposed to be justified by, the XII Article of the Treaty of Utrecht.' [1]

[1] By Article XII French subjects were excluded 'from all kinds of fishing . . . within 30 leagues' of the coasts of Nova Scotia.

The Hudson's Bay Company and British firms engaged in whaling sent protests respecting the ukase to the Board of Trade. On January 18, 1822, the Marquess of Londonderry wrote Count Lieven, Russian ambassador at London, that he was directed to make such provisional protest against the ukase as would fully serve to save the rights of Great Britain and protect British subjects from molestation in the exercise of their lawful callings in the North Pacific. He also denied the right of Russia to forbid navigation within one hundred miles of the coast.

In September 1822 Count Lieven stated to the Duke of Wellington that the 'Emperor did not propose to carry into execution the Ukase in its extended sense,' but had instructed the Russian ships to cruise close inshore;[1] also that the Russian minister in the United States had been authorized to treat upon limits in North America with the United States. He stated confidentially that, if Great Britain 'had any claim to territory on the north-west coast of America,' it might be brought forward, 'so as not to be shut out by any agreement made between Russia and the United States.'

In October and November 1822 the Duke of Wellington exchanged notes with Count Nesselrode respecting the claims of Russia. Wellington objected to the claim of sovereignty on the ground that, while Great Britain might, with good grounds, dispute with Russia the priority of discovery, the forts established by the Hudson's Bay and North-West Companies gave her the 'more easily proved, more conclusive, and more certain title of occupation and use.' He further stated that Great Britain could not admit the right of any power to claim jurisdiction seaward for one hundred miles, or to convey to private merchant ships the right to search in time of peace.

The Russian government, in reply, claimed that the Hudson's Bay and North-West Companies had no posts on the Pacific between the 51st and 60th parallels; that, since the discoveries of Bering and Chirikof in 1741, Russian settlements had been growing; that in 1799 the charter of

[1] Respecting these assurances, Wellington observed that 'this explanation when given will be very little satisfactory.'

the Russian American Company granted them the trade of the coast to latitude 55°, and that this charter had not been protested by Great Britain. They offered, however, to enter into friendly negotiations for a settlement of boundaries between the two powers.

On January 31, 1823, Count Lieven informed George Canning that he was instructed to propose that ' the question of strict right be temporarily set aside on the part of both, and that all the differences ' be adjusted by a negotiation at St Petersburg. In accordance with the Russian proposition, Sir Charles Bagot, British ambassador at St Petersburg, was instructed to commence negotiations.

Negotiations between the United States and Russia

It is necessary here to notice the negotiations between the United States and Russia. When informed officially of the ukase of 1821, the United States government denied *in toto* the claims of Russia to any territory south of latitude 55° N, basing this contention on the charter granted by Emperor Paul to the Russian American Company, December 27, 1799.

On April 14, 1823, the Russian envoy, Baron Tuyll, proposed that negotiations be initiated between the United States and Russia. John Quincy Adams, United States secretary of state, suggested to Stratford Canning ' whether it might not be advantageous for the British and American Governments . . . to empower their ministers at St Petersburg to act in the proposed negotiation on a common understanding.' He added that the United States had no territorial claims of their own as high as the 51st degree of latitude.

Joint Negotiation of Great Britain and the United States with Russia

George Canning wrote Sir Charles Bagot, British ambassador at St Petersburg, that ' such a concert as the United States are understood to desire will be peculiarly advantageous . . . and it would certainly be more easy for His Majesty to insist lightly on what may be considered as a point of national dignity, if he acted in this respect in concert

with another Maritime Power . . . Great Britain and the United States may be satisfied jointly with smaller concessions than either Power could accept singly, if the demands of the other were likely to be higher than its own.' Respecting the settlement of the boundary between the two powers, he said that it might be settled upon the principle of joint occupancy or of territorial demarcation, the latter being clearly preferable, and that a line of demarcation drawn at latitude 57° N would be satisfactory to Great Britain and fair to Russia.

Sir Charles Bagot proposed Cross Sound, in approximate latitude 58¼° N, and Lynn Canal as the boundary on the coast, and a due north line from the head of Lynn Canal in about 135° W longitude as the boundary on the mainland. Chevalier de Poletica proposed latitude 54° N, and 'for the longitude such a line as in its prolongation in a straight line toward the pole would leave the Mackenzie River outside of the Russian frontier.' To Poletica's objection that the Cross Sound line would deprive Russia of Sitka Island, Bagot suggested a pecuniary indemnity.

The Monroe Doctrine

In October 1823 Bagot ascertained from Henry Middleton, United States minister at St Petersburg, what 'he had long had reason to suspect,' that the United States were prepared to claim that they had at least an equal right with Great Britain and Russia to the whole coast as high as latitude 61° N, basing their claim upon the treaty of Florida Blanca, 1819, whereby Spain ceded to the United States all her rights and claims north of latitude 42° N. On December 2, 1823, President Monroe, in his message to Congress, declared that, in connection with the negotiations with Russia, the occasion had been 'judged proper for asserting as a principle . . . that the American continents, by the free and independent conditions which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers.' In the same month Richard Rush, United States minister at London, informed George Canning that he was instructed to propose that no settlements

be made 'by Russian subjects south of latitude 55 degrees, by citizens of the United States north of latitude 51 degrees, or by British subjects either south of 51 degrees or north of 55 degrees.' As Great Britain and the United States were at that time in joint occupation of the territory north of latitude 42°, and as Great Britain had repeatedly refused to accept latitude 49° N as her southern boundary, it can hardly be claimed that the American proposition erred on the side of modesty.[1]

Canning asked Rush for an explanation of the president's declaration respecting colonization. As Rush said he 'could explain it no otherwise than as pointed at Russia,'[2] Canning declined to join the British negotiations to the American.[3] The negotiations with Russia thenceforth proceeded separately, and, on April 17, 1824, the United States concluded a treaty with Russia whereby it was agreed that the citizens of the United States would not form settlements north of latitude 54° 40′, and that Russian citizens would not form settlements south of it. As the convention of 1818, providing

[1] George Canning, in his dispatch to Bagot, January 15, 1824, refers to the coincidence that both Russia and the United States suggested 55° N as the line of demarcation. As the United States proposed that the line between themselves and Great Britain be drawn at latitude 51° N—*the point at which the Russian pretension as set forth in the ukase of* 1821 *terminated*—he observed that 'it does not seem very uncharitable to suppose that the object of the United States in making a selection, otherwise wholly arbitrary, of these two points of limitation for British Dominion was to avoid collision with Russia themselves, and to gratify Russia at the expense of Great Britain. There is obviously no great temptation to call in such an Arbiter, if the partition between Russia and ourselves can be settled, as no doubt it can, without arbitration' (*Appendix to the Case of his Majesty's Government before the Alaska Boundary Tribunal*, i. p. 6).

[2] *George Canning and his Friends*, ii. p. 217.

[3] On January 23, 1824, Stratford Canning wrote Sir Charles Bagot: 'There are so many points of rivalship between the two countries, with so much prejudice on one side, and so much forwardness, not to say impudence, on the other, that I almost despair of ever seeing my wishes on that subject realized. I see that you are about to plunge into your North-western negotiations, and I congratulate you most heartily on having at least to swim in that element without an attendant Yankee offering a cork-jacket, and watching his opportunity to put your head under water' (*George Canning and his Friends*, ii. pp. 220-1).

On February 17, 1824, Bagot wrote Canning that the original instructions to Middleton were: 'Nothing less than to propose to Russia to proceed to divide the whole coast in question between Her and the United States to our entire exclusion' (*Bagot Papers, 1823-24*; in Canadian Archives).

for joint occupancy of the Oregon territory by Great Britain and the United States, had still four years to run, there was ample time for negotiations between these nations respecting the territory between latitude 42° and 54° 40′.

Instructions to Bagot

On January 15, 1824, George Canning instructed Bagot to suggest a boundary through Chatham Strait, or, failing that, the channel 'which separates the whole archipelago from the mainland.' If neither channel could be obtained, the line was to be drawn 'on the mainland to the north of the northernmost post of the North-West Company from east to west till it strikes the coast, and thence may descend to whatever latitude may be necessary for taking in the island on which Sitka stands.' On the mainland Bagot was instructed to claim the meridian of Mt St Elias as the boundary, or, failing that, the 135th meridian. Southward of Lynn Canal he was to limit the Russian coast-strip to a width of fifty or one hundred miles, but not on any account to allow it to extend to the Rocky Mountains.

Bagot's Proposals

On February 16, 1824, Bagot opened negotiations at St Petersburg with Nesselrode and Poletica. He first proposed that the boundary should run through Chatham Strait and Lynn Canal; thence north-westward to Mt St Elias or to the 140th degree of longitude, and thence, along that meridian, to the Arctic Sea. Nesselrode and Poletica offered to accept a line from the southern extremity of Prince of Wales Island eastward to Portland Canal; thence up Portland Canal to the head; thence following the mountains which run along the coast (*montagnes qui bordent la côte*) to longitude 139° W; thence along the meridian to the Arctic. Except that it follows the 139th meridian instead of the 141st, this is practically the boundary as fixed by the treaty of 1825.

Bagot then proposed a line through the strait north of Prince of Wales and Duke of York (Zarembo and Wrangell) Islands to the mainland; thence northward 'parallel to the sinuosities of the coast and always at a distance of ten

marine leagues from the shore,' to 140° W longitude ; thence due north following the 140th meridian.

The Russian plenipotentiaries adhered to their first line, but offered the free navigation of rivers crossing the coast-strip and to open the port of Sitka to trade for British subjects. They reminded Bagot that, 'without a strip of land on the coast of the continent from Portland Channel, the Russian Establishments on the adjoining islands would be left unsupported, that they would be left at the mercy of those Establishments which foreigners might form on the mainland, and that all settlement of this nature, from being grounded upon the principle of mutual conveniences, would offer only dangers to one of the parties and exclusive gains to the other.'

On March 19 Bagot proposed a line passing up Clarence Strait to the middle of Sumner Strait and thence following his second line. This would have conceded Prince of Wales and the smaller islands to the west of it to Russia. This also was rejected. As Bagot had made practically all the concessions he was authorized to make, he suspended negotiations.[1]

In Nesselrode's dispatch to Count de Lieven, April 17, 1824, notifying him of the failure of the negotiations, he claimed that the Hudson's Bay and North-West Companies 'have hardly, within the last three years, reached the neighbourhood of these latitudes, whilst they do not yet occupy any point contiguous to the Ocean, and that it is a known fact that it is only for the future that they are endeavouring to secure the benefits of the fur trade and of fishing. In short, we desire to keep and the English companies want to acquire.' He also stated that, if Prince of Wales Island were isolated, as proposed by Bagot, it would be rendered valueless to Russia. Respecting the coast he said: 'As for us we restrict our demands to a small strip (*lisière*) of coast on the continent . . . when Russia persists in claiming the reservation of an unimportant strip on the mainland, it is

[1] On March 29, 1824, Bagot, in a private dispatch to Canning, said that the Russian government 'must be dealt with as you would deal with a horsedealer. Their whole conduct in the late negociation has been of the most huckstering and pedlarlike character' (*Bagot Papers, 1823-24*; in Canadian Archives).

only as a means to enhance the value, nay more, not to lose, the adjacent islands.'

Modified Instructions to Bagot

On July 12, 1824, George Canning instructed Bagot to accept Nesselrode's offer except that, in 'fixing the course of the eastern boundary of the strip of land to be occupied by Russia on the coast, the seaward base of the mountains is assumed as that limit.'

As an additional security that this line would not be carried too far inland, he stipulated that it should 'in no case (*i.e. not in that of the mountains, which appear by the map almost to border the coast,*[1] turning out to be far removed from it) be carried further to the east'[2] than ten leagues from the sea, but that it would be desirable, if he were 'enabled to obtain a still more narrow limitation.' He stipulated, moreover, that the use of Sitka Harbour, and the right of navigation of the rivers on the continent, should be in perpetuity.

Lieven represented to Canning that when a 'chain of mountains is made to serve for the establishment of any boundary whatever, it is always the crest of those mountains that forms the line of demarcation,' and that the word 'base,' instead of preventing controversy, would probably be fruitful of it. Canning had only used the word 'base' because

[1] Italics not in original.

[2] This stipulation was inserted at the instance of J. H. Pelly, governor of the Hudson's Bay Company, who had written Canning on May 26 preceding, that the mountains described by the Russians as at a '*très petite distance*' might really be at a very considerable distance from the coast, and that therefore the distance ought to be limited, as suggested by Bagot, 'to a few leagues, say, not exceeding ten, from the shores.'

On April 20 Canning wrote Bagot: 'By the enclosed copy of a letter from Mr Pelly (from *pellis*, a skin) you will gather that I have the consent of the Fur Companies to close with the Russian Proposal' (*George Canning and his Friends*, ii. pp. 232-3).

That Canning was in close touch with the British interests affected adversely by the Russian ukase, is indicated by his private letter of July 29, 1824, to Bagot. He humorously wrote that the proposed convention 'had been submitted to both the furry and the finny tribes—the Enderbys, the Pellys and the Barrows. . . . In addition to the claims of science, there is very nice "bobbing for whale," they tell me, *ipsis Behringi in faucibus*, which must be guarded' (*George Canning and his Friends*, ii. p. 266).

Great Britain was then, and had been for many years, engaged in a controversy with the United States respecting the 'highlands' boundary between Quebec and Maine—the boundary by the treaty of 1783. He therefore instructed Bagot, if pressed, to accept the 'crest.'

When Bagot submitted his proposal to the Russian plenipotentiaries on August 21, they refused to concede, for a longer term than ten years, the opening of the port of Sitka or liberty of navigation along the coast of the *lisière*, or to concede any rights to visit the coasts north of latitude 60° N. To Bagot's protest that they had, on April 5 preceding, offered to open the port of Sitka and the *lisière*, they replied that it was never their intention that the freedom should be perpetual.[1]

Instructions to Stratford Canning

Negotiations were suspended, and shortly afterwards, as he desired a post nearer England, Bagot was transferred to The Hague. George Canning decided to send a special mission to negotiate the treaty, and, in December 1824, Stratford Canning was appointed plenipotentiary on the part of Great Britain. He was instructed: that it was comparatively indifferent to Great Britain whether the question of boundaries was hastened or postponed, but that Russian pretensions to exclusive dominion over the Pacific must be repealed; that the only point to which the British government attached any great importance was 'the doing away (in a manner as little disagreeable to Russia as possible) of the effect of the Ukase of 1821'; that the substitution, as the boundary of the *lisière*, of a line ten leagues from and parallel to the coast, for the crest of the mountains, was inadmissible, particularly as the latter was the boundary

[1] Probably the change of front was due to the fact that on April 17, twelve days later, they had signed the treaty with the United States granting these privileges to the latter for ten years only. In addition Bagot had, in July following—though without instructions—attended a preliminary conference with Russian and Austrian plenipotentiaries respecting the attempt of the Greeks to achieve independence. Canning repudiated Bagot's action, and eventually all negotiations ceased between England and the Holy Alliance. This undoubtedly gave great offence to Russia, whose double-dealing had determined Canning to act independently.

suggested by the Russians ; that Great Britain would accept the *summit* instead of the *seaward base* as the line of demarcation ; that from the vicinity of Mt St Elias to the Arctic, the line should follow the 141st meridian, and that the limitation of the opening of the port of Sitka to ten years was acceptable provided no other nation received more favourable terms.

In concluding George Canning stated that

> It is not, on our part, essentially a negotiation about limits. It is a demand of the repeal of an offensive and unjustifiable arrogation of exclusive jurisdiction over an ocean of unmeasured extent ; but a demand qualified and mitigated in its manner, in order that its justice may be acknowledged and satisfied without soreness or humiliation on the part of Russia. We negotiate about territory to cover the remonstrance upon principle.

Difficulties arose between the negotiators with reference to the definition of the *lisière* as following the crest of the mountains except where it was more than ten leagues from the coast. Eventually this point was conceded by the Russians, but that the concession rankled is evident from the correspondence. On March 3, 1825, Nesselrode wrote Count Lieven that this was the only point that had given rise to any difficulties, and that the

> Emperor would have found it more mutually just, more equally advantageous, if the natural frontier formed by the mountains bordering on the coast were adopted by both parties as the invariable line of demarcation. England would have gained thereby wherever those mountains were less than ten marine leagues from the sea ; Russia, wherever that distance was greater ; and in view of the want of accuracy of the geographical notions which we possess as to these countries, such an arrangement would have offered an entire equality of favourable chances to the two contracting parties.

George Canning assured Lieven that the British demand arose solely from a sincere desire to prevent the recurrence of any disagreeable discussion in future, and not from any intention of acquiring an increase of territory ; and that the

disputes in which they were engaged with the United States, on account of a similar 'stipulation in the Treaty of Ghent,'[1] had shown the inexpediency of a delimitation established on this principle.

The two governments were in close touch with their respective trading companies, and it is a fair inference that the Russian American Company feared the limitation would be detrimental to their interests.[2]

Treaty of February 28, 1825

On February 28, 1825, the treaty—practically the same as that proposed by Stratford Canning—was signed at St Petersburg.

Articles I and II were identical with the similarly numbered articles of the treaty between Russia and the United States, signed the previous year. By them Russia renounced her extravagant claims to maritime jurisdiction, and it was mutually agreed that vessels of either party should not land, without permission, at establishments of the other.

Articles III and IV defined the line of demarcation as follows :

> Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in the parallel of 54 degrees, 40 minutes, north latitude, and between the 131st and 133rd degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude ; from this last-mentioned point the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude (of the same meridian) ; and, finally, from the said point of intersection, the said meridian line of the 141st degree, in its prolongation as far as the frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the northwest.

[1] An error : should read ' Treaty of Paris, 1783.'

[2] On March 29, 1824, Bagot wrote Canning that Nesselrode and Poletica 'are both under the dominion of the Russian American Company' (*Bagot Papers, 1823-24*; in Canadian Archives).

IV. With reference to the line of demarcation laid down in the preceding Article it is understood :

1st. That the island called Prince of Wales Island shall belong wholly to Russia.

2nd. That whenever the summit of the mountains which extend in a direction parallel to the coast, from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude, shall prove to be at the distance of more than 10 marine leagues from the Ocean, the limit between the British possessions and the line of coast which is to belong to Russia, as above mentioned, shall be formed by a line parallel to the windings of the coast, and which shall never exceed the distance of 10 marine leagues therefrom.

Article V provided that no establishments should be formed by either party in the area assigned to the other. Article VI acknowledged the right, in perpetuity, of British subjects to navigate all rivers and streams draining into the Pacific that crossed the *lisière*. Other articles conceded rights of navigation for ten years.

The 'Dryad' Case

In May 1834 the Hudson's Bay Company dispatched an expedition in the *Dryad* to establish a trading post on the Stikine River at a distance exceeding ten marine leagues from the Pacific. Near the mouth of the Stikine the vessel was boarded by a Russian officer, who refused to allow it to enter the river. The Hudson's Bay Company appealed to the British government and claimed £22,000 damages. In December 1835 the British government protested the action of the Russian officials, and presented the company's claim. Several communications were exchanged, in which Count Nesselrode, in a very disingenuous way, endeavoured to justify the Russian action. In October 1838 Milbanke, British minister at St Petersburg, presented a stiff note practically demanding satisfaction. He observed that, under Article VI of the treaty of 1825, the British were guaranteed the free navigation of the rivers that crossed the *lisière*, and that the

term of ten years granted in Article VII to the British to navigate and trade along the *lisière*, had not expired when the *Dryad* was turned back. In December Nesselrode, in a memorandum to Count Kankreen, conceded that they would 'be obliged ultimately to give into because the clear provisions of the treaty are not calculated to strengthen the side we have defended until now. . . . As the matter now stands, we are not likely to have any more plausible pretexts for further evading the claim for indemnity.' Nesselrode recommended that the Russian American Company should negotiate a settlement with the Hudson's Bay Company.[1] As a result of the negotiations, the latter leased from the Russian company the exclusive right of trading on the mainland between latitude 54° 40′ and the entrance to Cross Sound for a yearly payment of two thousand land-otter skins. This agreement was renewed from time to time, and finally expired in 1867.

Neutralization during the Crimean War

When the Crimean War broke out, the Russian American and Hudson's Bay Companies proposed to their respective governments that the Russian and British territories on the west coast of North America should be recognized as neutral territory. This arrangement was loyally carried out by Great Britain, but was violated by Russia.[2] Had Great Britain been informed of this violation, her Pacific fleet would have seized Russian America, and what is now Alaska would in all probability have passed to the British crown.

[1] 'This agreement would be especially desirable because it would enable us to avoid all further explanations with the Government of the United States as to its ceaseless demands, disadvantageous to our interests, for the renewal of Article IV of the Treaty of 1824, which granted to American ships the right of free navigation for ten years' (Nesselrode to Kankreen, January 4, 1839, in *Appendix to the Case of the United States*, p. 312).

[2] 'A few English cruisers appeared at the entrance of Sitka Bay at various times, but finding no vessels of war, nor any evidence of a violation of the agreement, inflicted no damage. . . . This was either a fortunate accident or was due to the vigilance of the Russians' (*Bancroft's Works, History of Alaska*, xxxiii. p. 571).

Sale of Russian America to the United States

In 1867 Russia sold her American possessions to the United States for $7,200,000. Many American writers have published sensational accounts of the occurrences that led up to the transaction, but investigation indicates that it is susceptible of a very commonplace explanation.[1]

An American company desired to obtain a licence to trade for furs in part of Russian America. Sir George Simpson, the able autocrat of the Hudson's Bay Company, had passed away in 1860; in 1863 the Hudson's Bay Company had been taken over by the International Financial Association; since 1864 the new company had had under consideration the sale to Canada of its territorial rights and claims, and the only point at issue was the question of price; the lease had only been renewed for three-year periods since 1859. As it was therefore obvious to Russia that the Hudson's Bay Company would allow the lease to expire at a very early date, she decided to sell the whole territory to the United States, instead of leasing the coast-strip to an American fur-trading company, as at first suggested.

British Request for Joint Survey, 1872

In 1872 Sir Edward Thornton, British minister at Washington, inquired of Hamilton Fish, secretary of state, whether the United States would be willing to appoint a commission to define the boundary between Alaska and British Columbia. As a result, President Grant, in his message to Congress, December 2, 1872, recommended the appointment of the

[1] One commonly accepted tale is, that in 1863 Russian fleets were dispatched to New York and San Francisco, and that their sealed orders, to be opened in case of intervention by a European power, directed them to range themselves on the side of the federals. Like most tales of the kind, the revelations are 'corroborated by a well-known New York gentleman,' who was shown by Chancellor Gortschakoff 'an order in the Czar's own hand directing his Admiral to report to President Lincoln for orders in case England or France sided with the Confederates,' etc., etc., all, of course, in 'strict confidence.' That Gortschakoff would show an important official dispatch is unbelievable. For this and similar tales, see Balch's *The Alaska Frontier.*

commission, but Congress failed to take action on account of the expense. Fish then suggested that the boundary should be determined only where it crossed the Stikine River and a few other important points.

Boundary on Stikine River

In 1875 Hamilton Fish communicated to Sir Edward Thornton letters in which it was alleged that the Canadian custom-house on the Stikine was in United States territory. The Canadian Privy Council recommended that the point where the boundary intersected the Stikine River should be determined. In 1876 representations were made by the United States government respecting a convict named Peter Martin, who was tried and convicted in a British Columbian court for an assault alleged to have been committed near the mouth of the Stikine. In 1877 the Canadian government instructed Joseph Hunter to ascertain the position of the boundary-line on the Stikine. Though Hunter reported that the assault was committed in the United States territory, Martin was 'surrendered on the ground that he was a prisoner conveyed through United States territory.' Hunter stated that the line 'following the summit of the mountains parallel to the coast' crossed the Stikine 19·13 miles from the coast in a direction at right angles thereto.

Representations respecting the importance of a settlement of the boundary were repeatedly made by Great Britain, but without any action by the United States government, except that, in 1878, they accepted Hunter's line, provided it was understood to be a provisional arrangement only.

Dall-Dawson Correspondence

In 1884 William H. Dall, an officer of the United States Geological Survey, in a semi-official letter to Dr George M. Dawson, suggested a settlement of the boundary. He said that 'the continuous range of mountains parallel to the coast . . . having no existence,' the United States would

wish to fall back on the ten-leagues line parallel to the coast, and that it would 'be impracticable to trace any such winding line over that "sea of mountains."'

The United States government adopted Dall's argument, and in 1886 Edward John Phelps, United States minister at London, in a communication to the Marquess of Salisbury, suggested that an international commission should be appointed to fix a conventional boundary, as it was obvious that drawing a line 'parallel to the windings of the coast' was a geographical impossibility. He said: 'The result of the whole matter is that these Treaties . . . really give no boundary at all, so far as this portion of the territory is concerned.'

In 1887 Sir Lionel Sackville-West, British minister at Washington, called the attention of Thomas Francis Bayard, United States secretary of state, to statements in a report by Lieutenant Schwatka, United States army, in which he indicated two points, Perrier (Chilkoot) Pass and 141° W longitude, which he determined as defining the international boundary. Sir Lionel observed that Schwatka had made a military reconnaissance in British territory without permission from the British government, and that although it had agreed, in principle, to take part in a preliminary investigation of the boundary question, it was not prepared to admit that the points fixed by him determined where the line should be drawn.

In 1888, as a result of informal conferences, Dawson and Dall formulated the British and United States contentions respectively. Several conventional lines were proposed, but the differences were irreconcilable.

British Protests

In June 1888 the Canadian government was informed that certain persons were about to receive a charter from the Alaskan authorities to construct a trail from Lynn Canal by way of White Pass to the interior of Alaska. At the instance of the Canadian government, Sir Lionel Sackville-West was instructed to inform the United States government that 'the territory in question is part of Her Majesty's dominions.'

Sir Lionel omitted to specify the locality referred to, and Bayard replied that he had no information indicating that such action was contemplated.

In 1891 Sir Julian Pauncefote addressed a note to James G. Blaine, United States secretary of state. He quoted a report of the United States Coast Survey, wherein it was stated that this bureau proposed to undertake a survey of the boundary '*through the Portland Canal*' to 56° N latitude, and thence north-westerly, following, as near as practicable, the '*general trend of the coast*, at a distance of *about 35 miles from it*,' etc. He contended that 'the actual boundary line can only be properly determined by an International Commission.'

Boundary Survey Conventions, 1892 and 1895

On July 22, 1892, a convention was signed by Michael H. Herbert and John W. Foster, on the part of Great Britain and the United States respectively. It provided for a joint survey of the territory adjacent to the line from latitude 54° 40′ to its intersection with the 141st meridian, the surveys to be completed within two years. As the time allotted was found insufficient, another convention was concluded February 3, 1894, extending the time to December 31, 1895.

William F. King and Thomas C. Mendenhall were appointed commissioners on behalf of Great Britain and the United States respectively, under the Alaska Convention of 1892. In 1895 General W. W. Duffield succeeded Mendenhall. On December 31, 1895, Duffield and King signed their report and transmitted it, with accompanying maps, to their respective governments.

Friction at Chilkoot and White Passes, 1896

The discovery of gold in 1896 in the valley of the Klondike River resulted in an influx of tens of thousands of miners and others. The ports of Dyea and, later, Skagway sprang into existence at the head of Lynn Canal, the gateway to the Upper Yukon via the Chilkoot and White Passes. Though

Canada's claim to the territories at the head of Lynn Canal was well known, the United States revenue officers ruled that the regulations forbade landing from British vessels anywhere on the shores of that inlet. As a result of correspondence between the Canadian and United States governments, Dyea and Skagway were made sub-ports of entry, this arrangement being accepted by Canada.

On January 30, 1897, Sir Julian Pauncefote and Richard Olney signed, on behalf of Great Britain and the United States respectively, a convention providing 'for the demarcation of so much of the 141st meridian of west longitude as may be necessary for the determination of the boundary' between Yukon and British Columbia and Alaska.

As the great traffic attracted to the valley of the Yukon by the gold discoveries traversed the passes at the head of Lynn Canal, it became important that the boundary, especially in that particular locality, should be defined. In February 1898 the British government proposed to the United States that the determination of 'the boundary south of Mount St Elias should at once be referred to three Commissioners (who should be jurists of high standing), one to be appointed by each Government, and a third by an independent Power'; that the commission should proceed at once to fix the frontier at the heads of inlets traversed by this traffic; and that, pending the settlement of the boundary, a *modus vivendi* be arranged.

On May 9, 1898, the United States government consented to the temporary demarcation of the boundary in the region at the head of Lynn Canal. They proposed that monuments should be erected, but stipulated that this arrangement was not to be considered as in any manner prejudicing their rights under existing treaties. The Canadian government recommended that posts should be erected at the summits of the Chilkoot and White Passes, and at the confluence of the Chilkat and Klehini Rivers.

In 1896 four storehouses were constructed near the mouth of Portland Canal, but their existence was not known to the British government till 1901. In that year it was discovered that a United States Coast Survey chart indicated one each

on Wales and Pearse Islands, and two on the western shore of Portland Canal. As they had obviously been erected solely to form the basis of a claim of 'effective occupation,' Lord Pauncefote, British ambassador at Washington, was instructed to make inquiry as to their nature, and the reason for their erection in the disputed territory. John Hay, United States secretary of state, claimed that they were on territory that had been in the possession of the United States since its acquisition from Russia, and that he was not aware that the British government had ever advanced any claim to it prior to May 30, 1898.

Joint High Commission, 1898-99

At a meeting in Washington in May 1898, preliminary to the appointment of a joint high commission for the adjustment of a number of differences between Great Britain and the United States, it was deemed expedient to come to an agreement upon 'provisions for the delimitation and establishment of the Alaska-Canadian boundary,' and that each government should communicate to the other a memorandum of its views on this and other stated subjects.

In July Sir Julian Pauncefote delivered to the United States secretary of state a dispatch setting forth the views of the British government. The dispatch pointed out that, as the provisional line was 'more than 100 miles from the ocean, Her Majesty's Government cannot reasonably be expected to continue to accord it provisional recognition for an indefinite period, and, pending a definite settlement of the question, a provisional line more in accordance with the treaty stipulations should be adopted, which will allow the occupation by Canada of one at least of the ports on this inlet.'

It further urged two special reasons for an early delimitation of the boundary near Lynn Canal; first, that as there had been a large influx of miners and others into the Klondike —to which access lay mainly through the coast-strip—the necessity of a customs frontier on the inlets was obvious; secondly, that the whole coast-strip was believed to be

auriferous; in any event the Joint Commission should, pending a final settlement, establish a temporary line on the various inlets and rivers crossing the coast-strip.

The memorandum of the United States government pointed out that the boundary had already been the subject of conventional arrangements, and, as the report of the Joint Commission was available, the two governments could proceed to establish the boundary, and that they would expect the Joint High Commission to determine the boundary in accordance with the treaties of 1825 and 1867, to delineate it upon proper maps and to establish boundary monuments.

The Joint High Commission, however, separated without any settlement of the points at issue.

On October 20, 1899, a *modus vivendi* between Great Britain and the United States was agreed upon. The provisional boundary was fixed at the summits of the White and Chilkoot Passes, and, on the Chilkat River, at the mouth of Klehini River.

Alaska Boundary Convention, 1903

After much negotiation a convention was concluded at Washington January 24, 1903, by Michael H. Herbert and John Hay, on behalf of Great Britain and the United States respectively. Article I of the convention provided for a reference of the Canada-Alaska boundary differences to a tribunal to 'consist of six impartial jurists of repute,' three to be appointed by His Britannic Majesty and three by the President of the United States; all questions to be decided by a majority of all the members.

By Article III it was agreed that the tribunal should consider, in the settlement of the questions submitted to its decision, the treaties of 1825 and 1867, particularly Articles III, IV and V of the first-mentioned treaty: the tribunal was also to 'take into consideration any action of the several Governments or of their respective Representatives, preliminary or subsequent to the conclusion of said Treaties, so far as the same tends to show the original and effective understanding of the Parties in respect to the limits of their

several territorial jurisdictions under and by virtue of the provisions of said Treaties.'

Article IV provided that the tribunal should answer and decide the following questions :

1. What is intended as the point of commencement of the line ?

2. What channel is the Portland Channel ?

3. What course should the line take from the point of commencement to the entrance to Portland Channel ?

4. To what point on the 56th parallel is the line to be drawn from the head of the Portland Channel, and what course should it follow between these points ?

5. In extending the line of demarcation northward from said point on the parallel of the 56th degree of north latitude, following the crest of the mountains situated parallel to the coast until its intersection with the 141st degree of longitude west of Greenwich, subject to the condition that if such line should anywhere exceed the distance of 10 marine leagues from the Ocean, then the boundary between the British and the Russian territory should be formed by a line parallel to the sinuosities of the coast and distant therefrom not more than 10 marine leagues, was it the intention and meaning of said Convention of 1825 that there should remain in the exclusive possession of Russia a continuous fringe, or strip, of coast on the mainland, not exceeding 10 marine leagues in width, separating the British possessions from the bays, ports, inlets, havens, and waters of the Ocean, and extending from the said point on the 56th degree of latitude north to a point where such line of demarcation should intersect the 141st degree of longitude west of the meridian of Greenwich ?

6. If the foregoing question should be answered in the negative, and in the event of the summit of such mountains proving to be in places more than 10 marine leagues from the coast, should the width of the *lisière* which was to belong to Russia be measured (1) from the mainland coast of the Ocean, strictly so-called, along a line perpendicular thereto, or (2) was it the intention and meaning of the said Convention that where the mainland coast is indented by deep inlets forming part of the territorial waters of Russia, the width of the *lisière* was to be measured (*a*) from the line of the general direction

of the mainland coast, or [illegible] the waters of the Ocean [illegible] Russia, or (c) from the [illegible]

7. What, if any exist, are [illegible] as situated parallel to the [illegible] within 10 marine leagues [illegible] form the eastern boundary?

Articles V and VI provided [illegible] meet at London; that, on receipt [illegible] at once appoint experts to lay [illegible] that, if a majority failed to agree [illegible] report to the respective governments.

ALASKA BOUNDARY

Lord Alverstone, Sir Louis [illegible] Armour were appointed commissioners [illegible] Britain. On the death of Justice [illegible] worth, K.C., was appointed in his [illegible] Sifton was appointed agent for Canada.

The Hon. Elihu Root, the Hon. [illegible] the Hon. George Turner were appointed [illegible] the part of the United States. [illegible] appointed agent for the United States.

The cases were exchanged May [illegible] Great Britain requested an extension [illegible] filing the counter case, but the United [illegible] refused it. The counter cases [illegible] following.

The first meeting of the tribunal [illegible] Office, London, September 3. The [illegible] were concluded on October 8, and [illegible] Lord Alverstone, handed to the [illegible] of the tribunal.

The points at issue can be [illegible] three heads: (1) The "point of [illegible] was unanimously of the opinion [illegible] initial point of the boundary [illegible] should pass north or south of [illegible]

...lower consisted in identifying
...ond) of the treaty. It involved
...s of water, and not the width or

...en it was surveyed and named
...e narrative made it quite clear
...ed 'Portland's Canal' lay to
...Sukkan, and Kannaghunut
...h of these islands formed the
...ciet; and that he noted the
...an Islands, but did not name
...ness Passage.

...That Portland Canal passed
...a Point on the mainland,
...an and Kannaghunut, the
...to the four islands above
...mmon usage, the channel
...ered to be the southern
...it was commonly known
...outh of the islands was
...therefore the islands
...distinguished between
...'Portland
...n the maps known to
...he Portland Canal of
...e from mainland to
...ween Pearse Island
...reaty.

...AND CANAL

...Passage, forming
...Portland Canal
...Islands, thus
...ages, and that it
...that existing
...Point and Alaska

the decision, and practically demonstrated that it was a compromise based on a concession by Lord Alverstone. He stated: that it was a boundary that had never before even been suggested by any one; that, from Vancouver's statement, it was incontestable that he had named the channel north of all four islands 'Portland Canal'; and that the tribunal was sworn to determine judicially only all questions referred to it. He concluded:

> Upon such findings of fact as those above described, and after a solemn adjudication that the Portland Channel of the Treaty lies to the north of Pearse and Wales islands, the taking of the two important islands Sitklan and Kannaghunut, from Canada, and giving them to the United States by a proceeding said to be judicial, is, 'according to my true judgment,' nothing less than a grotesque travesty of justice.

While the islands in question are of little value either to Great Britain or to the United States, there was no evidence presented by either nation, nor can any be found, that would indicate that Portland Channel was ever considered as passing between Sitklan and Wales Islands, as decided by the tribunal. F. C. Wade,[1] one of the British counsel, intimates plainly that, after Lord Alverstone had come to an agreement with the United States commissioners respecting the 'mountain' boundary, he was confronted by the Americans with a demand that he should either surrender the two small islands—thus enabling them to win a diplomatic 'victory'—or see the whole negotiation fail. That securing the success of the negotiation was more important than the title to two insignificant islands is undeniable, but whether the action of the United States commissioners was the action of three

[1] Wade states that Lord Alverstone drew up a memorandum in which he declared the joint views of the British commissioners 'to be that the channel ran north of the four islands.' Referring to Lord Alverstone's *volte-face* respecting Sitklan and Kannaghunut, he comments sarcastically: 'If this was a judicial decision, if this was not a compromise, is it not singular that at the moment when the United States commissioners decided to change their minds as to two of the islands, and Lord Alverstone decided to change his judgment as to the other two, His Lordship was the one to come forward with a subdivided question which just met the new conditions?' (*Canadian Magazine*, xxii. p. 339).

'impartial jurists' can safely be left to the judgment of posterity.

(3) *The mountain or lisière boundary.*—It formed the most important branch of the case and involved the determination of the line between the head of Portland Canal and the 141st meridian near Mount St Elias.

British Case

The British case contended: that the question whether Russia acquired a continuous strip of coast depended upon the meaning of the words '*côte*' and '*Océan*' in Articles III and IV of the treaty of 1825; that these words referred to coast and water outside the narrow inlets; that, in the Russian reply to Bagot's amended proposal, the coast left to Great Britain is described as starting from the 'embouchure' of Portland Canal, demonstrating that the canal was not 'coast'; that the treaty contemplated a shore-line such as admitted drawing another line parallel and at a distance of ten leagues; that the negotiators had Vancouver's map before them, and were aware that only a line parallel to the *general trend* of the coast was practicable; that the possible, and not the impossible, was contemplated; that the ten-league line drawn by the United States did not, and could not, follow the sinuosities of the '*côte*,' as they themselves interpreted that word; that it was drawn parallel to an imaginary line joining the heads of the inlets; that, in 1893, T. C. Mendenhall, in issuing instructions to the United States surveyors respecting the surveys under the convention of 1892, directed that they be continued to points not less than thirty miles from the 'general trend' of the mainland coast; that the only difficulty was due to the United States reading into the treaty a principle that British territory should nowhere reach salt water; that the Russian anticipations of danger to their establishments on the islands if they did not obtain a *lisière* of coast, did not warrant the assumption that their safety could only be secured by this exclusion; that Nesselrode in 1824 said: 'We restrict our demands to a small strip [*lisière*] of coast on the continent.'

Respecting the width of the *lisière*, the British case claimed : that it should be measured along a line at right angles to the general local trend of the coast ; that, if an inlet extended further than the line of mountains parallel to the coast, or, in the absence of mountains, further than ten leagues from such coast, the upper portion of it was British territorial water ; that the continuity of the fringe was liable to be broken by both the mountain boundary and the ten-league line.

Respecting the identity of the mountains parallel to the coast, the British case contended . that the treaty contemplated ranges with a general parallelism only ; that orographic features such as mountains could not be expected to run uniformly parallel to the coast, whether straight or winding ; that the treaty explicitly contemplated such variations from parallelism that they might, in places, be more than ten leagues from the coast ; that the treaty recognized specifically that the line was crossed by rivers, and therefore was not unbroken ; that the phrase '*crête des montagnes*' signified the summits of mountains adjacent to the sea, and was only introduced as a concession from the line along the seaward base ; that it was immaterial whether there were higher peaks or a plain behind them ; that the Russians described them as '*montagnes qui bordent la côte*,' and as being at a '*très petite distance*' from the coast ; that the Russians explicitly stated that they only demanded a 'narrow strip on the coast,' an 'unimportant strip on the mainland,' only a '*pointe d'appui*,' etc. ; that the crest of the mountains on the 56th parallel in longitude 131° 42′ was the point of departure ; that the line following the mountains and ridges indicated on an accompanying map fulfilled the requirements of the treaty, though it was susceptible of variations in detail.

Respecting acts of either government subsequent to 1825 that would tend to show the understanding of the parties in respect to their several territorial jurisdictions, the British case claimed that, as late as 1867, the Hon. Charles Sumner declared : that 'perhaps no region of equal extent on the globe, unless we except the interior of Africa or possibly Greenland, is as little known' ; that the lease to the Hudson's

Bay Company provided for the return of but one post, and that was on an island, not on the *lisière*; that, even if that lease was drawn in sweeping terms, the Russian company could not convey what did not belong to Russia; that the lease was due simply to the desire of the Hudson's Bay Company to avoid friction with the Russians, and to enjoy a monopoly of the trade; that from 1867 to 1877 there were United States troops in Alaska, but none upon the mainland; that there had been a general absence of United States control throughout the *lisière*, though there had been isolated acts of possession by citizens of the United States; that possession of Dyea and Skagway did not arise or continue under circumstances which should influence the tribunal so to delimit the boundary as to leave these places within United States territory; that the proposition to make Dyea a sub-port of entry came from the United States government; that, as the necessities of the case required immediate action, Canada, in accepting it, provided that her acceptance was 'pending settlement of the boundary question'; that the erection of storehouses on Wales and Pearse Islands had been promptly protested.

United States Case

The United States case contended: that Russia from the first sought to erect a territorial 'barrier' between her coasts and the inland possessions of Great Britain, and that she secured this barrier by the treaty of 1825; that the negotiators of the treaty had before them maps showing a range of mountains distant about ten leagues from the coast and following its curvature; that the monopoly of the Russian American Company was only of value so long as there was not a single trading post on the continental shore; that Russia refused Bagot's demand for territory lying upon the coast to 56° 30′, and demanded a territorial barrier against the nearer approach of British settlements; that Nesselrode's statement in 1824 that Russia required 'at some distance from the coast, a frontier-line' that should not be invaded by the British, demonstrated that the purpose

of the *lisière* was to create an unbroken barrier along the entire water-front of the continent; that the line at an unvarying distance of ten leagues was probably refused by Great Britain because it might give Russia the eastern slopes of the coast range; that Middleton, in reporting a conversation with Stratford Canning, said that by the treaty of 1825 the line of demarcation followed Portland Canal up to the fifty-sixth degree, 'then turns *eastward*[1] upon that latitude until it touches the highest ridge of the chain of mountains lying contiguous to and nearly parallel with the coast,' etc.; that the perpetual privilege secured to British subjects of navigation was confined to 'rivers' and 'streams' crossing the eastern boundary of the *lisière*, because, according to the mutual understanding of the contracting parties, no other waterways crossed the line of demarcation.

Reviewing the period 1825 to 1867, the United States case stated: that, after fruitless negotiations extending over eleven years, the United States in 1845 submitted to the measures of exclusion enforced by Russia; that during this period Russia exercised sovereignty and occupation in the *lisière* by control over the Indian tribes, by the conduct of trade, by the establishment of posts and forts, by the maintenance of its territorial rights against foreign encroachment, and by the surveys of its waters; that the correspondence in the *Dryad* affair proved that the Russian and British authorities concurred in the view that the boundary of the *lisière* was at a point ten marine leagues from its mouth.

Respecting the period since the cession to the United States in 1867, the United States case emphasized the various acts of sovereignty and occupation. After reciting the formalities of the cession and the acts of the various officials who were sent to the territory, it stated: that the map delimiting the boundary published by the government of the United States in 1867 was not protested; that their officials took possession of the territory so described without

[1] There is every reason to believe that this was a clerical error for 'westward.' It is incredible that Stratford Canning would make such a ridiculous statement unless it was a *lapsus linguae*. It is more probable that it was a slip of the pen on the part of Middleton.

any opposition ; that till 1877 the administration of Alaskan affairs was confided to the War department, except as to the control of trade and the protection of the revenue by officials of the department of the Treasury ; that after 1877 the government was divided between the Navy and the Treasury departments ; that the Indian inhabitants of the *lisière* rendered unquestioned submission to the naval officials ; that civil government was organized subsequent to the passage of the act of Congress of 1884, and that from 1867 there had been an ' unquestioned exercise of American sovereignty, by almost every form of administration.'

In conclusion, the United States case asserted that the evidence established the following facts :

(1) That it was the intention of Great Britain and Russia, by the treaty of 1825, to confirm in full sovereignty to Russia a continuous strip or *lisière* of territory along the continental shores of the north-west coast of America, extending from Portland Canal to the 141st meridian.

(2) That it was their intention that the width of such *lisière* was to be ten marine leagues, measured from the heads of all inlets—that is, from tide-water—unless within that distance there was, wholly or in part, a continuous range of mountains lying parallel to the sinuosities of the coast and extending from Portland Canal to the 141st meridian, in which latter case the summit of such range was to form the boundary ; that, as there is not in this area such a continuous range of mountains parallel with the sinuosities of the coast, therefore the width of the *lisière* above described is not limited by a boundary-line along the summit of such range, but solely by the agreed distance of ten marine leagues from tide-water.

(3) That the acts of Great Britain and Russia subsequent to the signature of the treaty, and the universal interpretation given to its delimiting articles by governments, geographers, cartographers and historians of those and other civilized nations, agreed with and confirmed the intention and meaning as above stated.

(4) That the United States purchased the territory from Russia, relying upon such interpretation of the treaty ; that

the purchase was open and notorious to the world, and that neither during the twelve months before the purchase price was paid, nor within thirty years thereafter, did Great Britain give notice to the United States that she claimed any portion of the territory.

(5) That the United States entered into possession of and occupied the *lisière* as above described, exercised sovereign rights therein, and treated the same at all times as a part of its national domain; and to such occupation and exercise of governmental authority Great Britain entered no protest or objection.

(6) That from the head of Portland Canal the boundary-line ran in a northerly direction to the 56th parallel; 'thence north-westerly, always ten marine leagues from tide water, around the head of Lynn Canal; thence westerly, still following the sinuosities of the coast at a distance therefrom of ten marine leagues, until the line intersected the 141st meridian.'

British Counter Case

The British counter case opened with a protest against the refusal of the United States to agree to an extension of time, and a statement that His Majesty's government reserved the right to put in some supplementary evidence which qualified the evidence presented in the Unites States case. It observed: that the United States case rather avoided the question of the construction of the words of the treaty of 1825; that it was mainly devoted to a search for some general and controlling principle which the negotiators might be assumed to have had in view, or to show from extrinsic evidence what was the arrangement in fact arrived at. It argued: that the sole function of the tribunal was to interpret the treaty by ascertaining its intention and meaning and not to recast it; that the character of the *lisière* depended entirely upon the meaning of the words '*côte*' and '*Océan*'; that, while the British government endeavoured to ascertain the sense in which these words were used, the United States case attempted to establish

an assumed controlling principle, and in support of it quoted isolated expressions and irrelevant statements of no authority; that, if such evidence as Middleton's report, *based upon his remembrance of verbal statements* by Stratford Canning, were admitted, all certainty would disappear.

The British counter case contended: that the only basis for the 'barrier' theory was an expression reported to have been used by Count de Lambert to Poletica; that such an expression could have no importance as a clue to a convention arrived at after long negotiations, not even commenced at the date when it was employed; that, assuming the Russian purpose was a 'barrier,' it would be provided by a strip of territory even if some of the inlets penetrated the strip and terminated in British territory; that, while British ships would have the right of 'innocent' passage through Russian territorial waters, they would have no right to trade or fish in them; that by international law the line of coast to be measured from is taken across the entrances of narrow inlets which are treated as not breaking that line; that it was intended to interpose only a strip of 'territory' free from British trade or settlement, and, if the waters between the headlands of inlets were territory, the strip would not be broken if carried across such inlets; that the United States did not understand that Russia had, by the treaty of 1824, secured anything more than freedom from the encroachment of American settlements, and from the access of Americans to Russian settlements; that the Russian *contre-projet* in which the *lisière* was first suggested offered the free navigation of the rivers crossing it, and that, for all the negotiators knew, any one of the inlets on Vancouver's charts might be the estuary of a navigable river; that the reply to the United States contention that Bagot's offer of a line further south than his Lynn Canal line had been a concession of both shores of the inlet, was that the idea of a *lisière* had not yet taken shape; that it was not access to the sea, but settlement and trade near her own settlements on the islands, that Russia desired to prevent Great Britain from obtaining; that as by Article VII of the treaty of 1825 Great Britain and Russia granted for ten years reciprocal privileges of

fishing and trading, this provision applied to the *lisière* assumes that part of the inland waters might belong to Great Britain—otherwise it would be meaningless; that the United States contention that the Russian negotiator—following Vancouver's chart—believed the mountain boundary and the ten-league line to be substantially the same was erroneous; that different charts show the mountains in different positions; that in any event the tribunal could not alter the treaty to make it agree with the Russian anticipation.

The British counter case claimed: that there were mountains parallel to the general trend of the coast that fulfilled the intent of the treaty; that the exercise of jurisdiction by Russia was practically confined to the islands and to the mainland north of the *lisière*; that the evidence indicated that the United States occupation of the *lisière* was not of such a nature as to materially strengthen their title; that the acts of jurisdiction in Lynn Canal were unknown to Great Britain, and her ignorance and absence of action could not be relied upon as showing acquiescence in the actions of the United States.

United States Counter Case

The United States counter case contended: that the peaks of the mountains adopted in the British case as forming the land boundary of the *lisière* are not '*la côte des montagnes situées parallèlement à la côte*' referred to in Article III of the treaty of 1825; that the British case rested upon the assumption that '*côte*' meant 'summits' instead of the 'crest' of the mountains, upon the assumption that distinct peaks can be said to parallel a coast-line, upon ignoring the value of the word '*sinuosities*' in the negotiations and treaty, upon a failure to construe the intent of the negotiators as evidenced in the correspondence, and upon the assumption of a datum line based upon an erroneous meaning given to the words '*côte*' and '*Océan*'; that these words used in describing the *lisière* were so used in their *physical* and not in their *political* sense; that the Hudson's Bay Company

was from the first the party in interest in the fixation of the boundary, and the best-informed as to the region; that the admissions by that company in the lease and in its interpretation were made by the only representative of the British government on that coast; that Great Britain, having failed to reject its interpretation, must be deemed to have conceded its correctness.

It stated that the law-officers of the crown had held: that by the Treaty of Washington, 1871, Great Britain had lost the free navigation of rivers flowing through Alaska, thus conceding that they flowed through United States territory; that the correspondence between the two governments, between 1872 and 1878, established that it was conceded the line should cross the Stikine, Chilkoot, Chilkat and other rivers, and that the only reason the line was not settled then was the excessive cost; that in 1885 the executive council of British Columbia stated that Hunter's survey conclusively established the 'mountains at the crossing of the Stikine to be about twenty miles from the sea'; that the Dall-Dawson conferences were entirely informal and unofficial; that at the Reciprocity Conference of 1892 no assertion was hinted at of a British claim to the heads of inlets or any rights on Lynn Canal; that Lieutenant Schwatka had no instructions to survey the boundary, nor did he attempt to do so; that the note in 1888 respecting the granting of a charter by Alaskan authorities was so vague and indefinite that no reply was made to it; that out of the note of 1898 grew the *modus vivendi* of 1898-9 respecting White and Chilkoot Passes and the Klehini River, but that it contained no protest against the occupancy of Dyea; that the so-called protests fell far short of the requirements of international law; that up to August 1, 1898, the United States government had no distinct and official announcement that the British government entertained views materially at variance with those maintained by it.

It was contended on the part of the United States: that the United States case contained an overwhelming array of evidence establishing its complete, continuous and uncontested occupation and control over the territory; that

the evidence adduced established beyond controversy that the United States had been in occupation and control of the Lynn Canal territory since 1867; that, though known to the Canadian government, no protest was made by it previous to 1898; that the British case was the first distinct, complete and formal announcement of the British claim respecting the boundary of the *lisière*.

Respecting the boundary of the *lisière*, as defined on the maps accompanying the British case, it was further contended: that, as the claim placed practically all the *lisière* rivers in British territory, it rendered meaningless Article VII of the treaty; that such an interpretation was at variance with the former attitude of the British and Canadian governments; that it ignored the acts of their own officials respecting the Stikine; that the line was impracticable inasmuch as it extended British dominion over territory admittedly belonging to the United States; that it deprived the United States of all the inlets and almost all the harbours along the *lisière*; that many mines operated by citizens of the United States were claimed as in British territory, and that the United States was allotted a *lisière* broken up into disconnected and worthless fragments, the burden of whose possession and control no government would be willing to assume.

Decision of the Tribunal

Lord Alverstone, Root, Lodge and Turner, forming a majority of the tribunal, agreed upon a mountain boundary that was practically in accordance with the United States contention. Sir Louis Jetté and Aylesworth strongly dissented, and refused to sign this or the Portland Canal branch of the award. The majority agreed upon a line joining certain peaks marked 'S' on an accompanying map. This formed a sinuous boundary distant about thirty miles from the general trend of the shore. It followed Hunter's line at the crossing of the Stikine, and the *modus vivendi* boundary at the summits of the White and Chilkoot Passes. On the Chilkat River, however, the provisional *modus vivendi* line was discarded, and the boundary was moved *upstream*

about twenty miles. From a point near the Stikine River to another near the Taku River, a distance of 125 miles, it was left undefined, pending further surveys in this region. Later, this area was surveyed and a series of peaks forming practically a straight line between the two terminal points was adopted.

Review

In endeavouring to arrive at a fair, unbiased interpretation of the differences that were terminated by the Alaska Boundary Tribunal, it is necessary to examine the provisions of the treaty of 1825, the negotiations that preceded it, and all collateral evidence, particularly the knowledge of the contracting parties respecting the disputed territory.

The differences that resulted in the treaty of 1825 were twofold: first, the protest of Great Britain against the extravagant assumption by Russia of territorial claims extending one hundred miles seaward, and, secondly, her claim to the Pacific coast from latitude 51° N northward. The latter was considered by Great Britain as of much less importance, but was made prominent to allow the Russian emperor to withdraw from an untenable position. This was succinctly stated by George Canning. He wrote that the origin and principle of the whole negotiation 'is not, on our part, essentially a negotiation about limits. It is a demand of the repeal of an offensive and unjustifiable arrogation of exclusive jurisdiction over an ocean of unmeasured extent. . . . We negotiate about territory to cover the remonstrance upon principle.' It is evident, therefore, that, in endeavouring to obtain a maximum extension of their boundaries, the governments of Great Britain and Russia were simply endeavouring to forward and protect the interests of their respective fur-trading companies, and were not animated by a desire to secure additional territory *per se*. That Canning, having conceded the principle of the *lisière*, endeavoured to contract its width to a minimum, was probably due to the influence of the Hudson's Bay Company.

As the awarded line through Portland Canal has been

discussed, it only remains to consider the 'mountain' or '*lisière*' boundary.

A study of the correspondence leads irresistibly to the conclusion: that Great Britain intended to concede an unbroken *coast-strip* or *lisière*[1] from Portland Canal northward; that Russia believed she was confirmed in an unbroken strip that did not contain a *point d'appui* for the Hudson's Bay Company; that the *lisière* or coast-strip was of unknown width, but was not more than ten leagues wide; that the boundary followed the summits of the first range of mountains, and was parallel to the windings of the shore.

As proof that Russia was insisting on an unbroken *lisière*, an incident in the negotiations and a clause of the treaty may be cited. Great Britain's suggestion that the seaward base of the mountains be adopted was rejected by Russia, on the ground that, if the mountain sloped down into the sea, *it would interrupt the continuity of their lisière.* That they also probably feared that the Hudson's Bay Company might establish themselves on the mountain slopes, does not diminish the strength of this argument. If the *lisière* was not unbroken, why did the treaty specifically concede the navigation of the rivers crossing it?

Having determined the continuity of the *lisière*, it now remains to examine the respective contentions of Great Britain and the United States to ascertain to what extent they differed from the correct interpretation.

The treaty defines the line of demarcation as following '*la crête des montagnes situées parallèlement à la côte.*' Both nations contended that there was no range of mountains *parallel to the coast.* The question of parallelism involves two points: (1) What constitutes a 'range of mountains parallel to the coast'? (2) What is meant by the '*crête*'?

Both parties assumed that this provision specified a *continuous* mountain ridge absolutely parallel to the coast for upward of five hundred miles—a thing that every geographer knows to-day, and that every geographer knew in 1825, is

[1] On February 28, 1824, Bagot wrote: 'It is evident to me that I cannot avoid giving some *lisière*, however narrow, upon the mainland' (*Bagot Papers, 1823-24*; in Canadian Archives).

not to be found anywhere on earth. The answer, therefore, must be sought in the intent of the treaty. The Russian negotiators were endeavouring to establish a barrier. While the charts showed a conventional range of mountains approximately parallel to the general trend of the coast, both parties recognized that it was only a conventional indication added by the draughtsman, possibly from verbal information. Hence the modifying clause respecting the ten-league maximum, which was pressed by the British and conceded by the Russians. It is evident, therefore, that the first tier of peaks —irrespective of the altitude of the peaks behind them and broken by streams only—filled all the requirements; that the word 'parallel' was not used in the ordinarily accepted sense, and that the line was only locally approximately parallel to the nearest portion of the shore. The United States contention that the treaty required a continuous mountain ridge parallel to the sinuosities of the shore, is not deserving of consideration. It assumed an intent on the part of the negotiators that is absolutely contradicted by the clause in the treaty conceding the navigation of the rivers that cross the *lisière*. This alone is sufficient to demonstrate that what was contemplated was simply a mountain boundary that would exclude British traders from the vicinity of tidewater.

The character of a mountain range is largely a geological question. When, as in the case of the Coast Range between Portland Canal and Lynn Canal, it is composed largely of granite and other intrusive rocks, regularity and continuity are invariably absent. The theoretical conditions assumed by the United States as indispensable could not be found, and, in any event, were not necessary. Its attitude was similar to that of Great Britain respecting the 'highlands' in the treaty of 1783. It assumed that the orographic features in question must have certain characteristics not properly attributable to them, and then deduced from the absence of these characteristics an incorrect conclusion.

The claim of the United States that '*crête*' necessarily meant the watershed summits was pure assumption, and was not justified by the facts. The true line lay between the

boundary contended for by Great Britain and the awarded line.

The basic principles having been thus determined, the mountain boundary, as defined in the treaty of 1825, could have been laid down on the detailed maps prepared by the Joint Commission. From the head of Portland Canal the line would naturally run northward to latitude 56° N, thence by a right line nearly due west to the peak nearest the shore of Behm Canal, and nearest latitude 56°, but north of it. From that point the arbitrators should have taken the peaks nearest the coast and joined them by a line so drawn as to give a continuous *lisière* except at river crossings. At river crossings the spirit and letter of the treaty would probably have required that the line should be carried upstream to a point where the mountain slopes approached the stream, or, failing that, to a point where the valley had a minimum width. This would have given a strip only a few miles wide, except up the river valleys where its depth would depend upon local conditions. While such a line would necessarily have been an arbitrary one, it would not have presented great difficulties to 'impartial jurists of repute' except in so far as the claims of either nation had been affected by occupation, acts of jurisdiction, etc.

This would have defined the line so far as the treaty was concerned, but the acceptance by Great Britain of Hunter's line at the crossing of the Stikine River, and of the *modus vivendi* lines at the summits of the White and Chilkoot Passes, and at the Klehini River, very materially strengthened the claim of the United States to the territory between these lines and the sea.

Except at the Stikine and the White and Chilkoot Passes, this line would have given the United States much less than it actually received, and would have given Great Britain considerably less than she contended for. Except at the points mentioned, and in some river valleys, the *lisière* would have been only two or three miles wide. The obvious solution of the situation created by such a line would have been a compromise whereby Canada would have been conceded—in return for a cession of territory elsewhere—a port on Lynn

Canal, with either a neutralized strip or the full ownership of a connecting strip.

This boundary was not claimed by Great Britain, as it would have conceded an unbroken *lisière* to the United States. This would have excluded Canada from tide-water and would have been an acknowledgment that Canada did not extend to it at Lynn Canal and elsewhere. As the United States was claiming that the boundary followed a line distant ten leagues from the heads of inlets it did not prefer it, though the line it contended for was not based upon a correct construction of either the letter or the spirit of the treaty.

Much stress has been laid upon the map evidence, which was almost uniformly opposed to the British contention. It is sufficient to say that, till detailed surveys were completed by the Boundary Commission in 1895, no geographer could draw the line of demarcation defined in the treaty, and, in the absence of any definite information, it was generally assumed by cartographers that the boundary was approximately ten leagues distant from the shore. It can hardly be seriously argued that indications of a boundary, based upon mere assumption and regarding which there was no definite information, could add material strength to the United States contention.

A review of the case would not be complete without some notice of the personnel of the Boundary Tribunal of 1903. The convention of 1903 provided that each nation should appoint as its representatives 'three impartial jurists of repute.' The British government assented to this proposition only after the United States had repeatedly refused to agree to an arbitration by three representatives of each nation, and a seventh member appointed by a neutral government.

Great Britain appointed: (1) Lord Alverstone, chief justice of England; (2) Sir Louis Jetté, lieutenant-governor of Quebec, ex-judge of the Superior Court of Quebec, and now chief justice of that court; (3) the Hon. J. D. Armour, judge of the Supreme Court of Canada. On Judge Armour's death, A. B. (now Sir Allen) Aylesworth, K.C., was appointed in his stead. Aylesworth was an eminent lawyer and

prospective justice of the Supreme Court, though he later declined the honour. Subsequently he was minister of Justice.

The United States appointed : (1) the Hon. Elihu Root, United States secretary of War, a member of the government that had, in diplomatic correspondence, contested Canada's case ; (2) the Hon. Henry Cabot Lodge, a member of the United States Senate, who is reported to have declared that Canada's contentions respecting the Alaska boundary were 'baseless claims' ; (3) the Hon. George Turner, Spokane, United States senator for the State of Washington : concerning him it has been said that 'decision in favour of Canada would have been easier for any other man in the United States (except members of the government) than for a politician of the state of Washington and a resident of Spokane.' [1]

The Canadian government was naturally much dissatisfied with the United States appointments, and the imperial government had the alternative of either breaking off the negotiations altogether—which they deprecated as a grave misfortune to Canadian interests—or of appointing representatives 'appropriate to the altered circumstances of the case.' Neither course was adopted.

It was stated later that President Roosevelt had offered the appointments to members of the United States Supreme Court. This is doubtful. If offered, it is more than a fair assumption that it was done in such terms as to indicate clearly that a refusal was desired and was expected. The appointments made by the President of the United States were a breach of faith.

Returning to the consideration of the mountain boundary : As already stated, the obvious solution would have been a treaty whereby Canada would have obtained a port on Lynn Canal. A concession of this nature would have demonstrated that the United States did not desire to pursue a purely selfish policy, regardless of the rights and welfare of her northern neighbour ; it would have enured to the benefit of United States trade ; it would have avoided the bitter feeling that was created in Canada by her intransigent attitude, which

[1] Ewart's *The Kingdom of Canada . . . Alaska Boundary*, etc., p. 306.

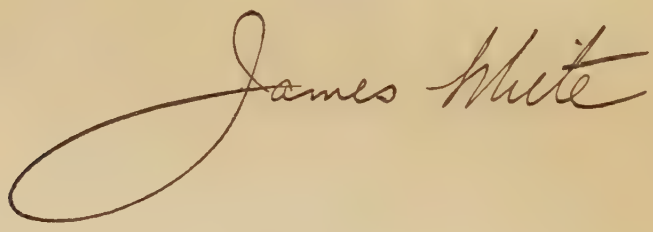
will not be allayed until she demonstrates by her actions that a statesmanlike policy prevails at Washington, instead of one dictated by purely political considerations.

The action of Lord Alverstone with reference to the Portland Canal islands has already been discussed. His vote with the Americans respecting the mountain boundary has been very severely criticized in Canada and, to a lesser degree, in England. These criticisms are undoubtedly justified if the Alaska boundary question only is considered; but, as an integral portion of the British Empire, Canada must expect that these questions will be dealt with imperially, and that the interests of the Empire as a whole cannot be sacrificed for a strip of territory which, while not unimportant, was not of vital importance. It was predicted in 1903 that the United States would establish fortifications on Sitklan and Kannaghunut that would dominate Port Simpson, then the prospective terminus of the Grand Trunk Pacific Railway. Ten years have rolled by; the fortifications have not been erected, and even the storehouses, erected to form a United States claim to Wales and Pearse Islands, are in ruins. Dyea is non-existent and Skagway is dying. When, in 1872, the German emperor awarded San Juan Island to the United States, similar fearsome tales were told respecting the forts that would be erected there to threaten Victoria. Now, forty years later, the forts are still non-existent; the barracks that sheltered the British and American troops during the joint occupation are sunk in decay, and a few hundred people make a bare living on the island over which two great nations nearly went to war.

So long as it remained unsettled the Alaska boundary was a problem that might at any moment have involved the two countries in war. While the territory lying between the true line and the awarded line has a certain value, it has not, thus far, yielded any considerable wealth, and, constituted as the American portion of the tribunal was, the awarded line—with one exception—probably represents the maximum that Lord Alverstone could obtain. The exception is the line in the valley of the Chilkat River. Here the *modus vivendi* line was abandoned, and the awarded

line was drawn nearly twenty miles north of it, although Canada had had a North-West Mounted Police post there since 1899. No reason has been assigned for this abandonment, but it has been suggested that Lord Alverstone, when marking the peaks in the boundary, forgot that there was a *modus vivendi* line at this point, and that his American colleagues did not consider it necessary to draw his attention to it.

Taking the question as a whole, it was absolutely necessary that it should be settled; with the exception mentioned, it could not have been settled without practically all the concessions that were made, and Lord Alverstone is therefore entitled to much more lenient judgment than he has generally received. So much cannot be said for the United States members of the tribunal.



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